AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 11 No 2 2011

The financial assistance of the European Union
is gratefully acknowledged.

First Floor
Sunclare Building
21 Dreyer Street
Claremont
7708
South Africa

ISSN 1609-073X

Cover design: Colette Alves

Typeset in 10 on 12 pt Stone Sans by ANdtp Services, Cape Town

Printed and bound by Shumani Printers

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AFRICAN HUMAN RIGHTS LAW JOURNAL

Editorial

The content of this issue is divided into three parts. In the first part, special attention is given to the commemoration of 25 years since the entry into force of the African Charter on Human and Peoples' Rights (African Charter) on 21 October 1986, and 30 years since its adoption, on 27 June 1986, in Nairobi, Kenya. This 'focus' part is made up of selected papers delivered at a conference, co-hosted by the African Commission on Human and Peoples' Rights (African Commission) and the Centre for Human Rights, and held at the Faculty of Law, University of Pretoria, on 11 July 2011. This conference, entitled 'Thirty years of the African Charter on Human and Peoples' Rights: Looking forward while looking back', was organised in conjunction with the twentieth African Human Rights Moot Court Competition. The papers contained in this volume were subsequent to their presentations peer-reviewed and reworked for publication.

As the rich collection of papers demonstrates, the African Commission has over the almost 25 years of its existence interpreted the African Charter as a living instrument. While the 25/30 year mark invites some reflection on the possibility of reforming the Charter, the progressive interpretive approach of the African Commission remedied many of the defects or deficiencies in the Charter text, including the 'claw-back' clauses and the limited provision for socio-economic rights. Setting in motion a process towards the amendment of the text may solidify these gains, but may – equally possibly – see the reversal of these gains in a process that ultimately requires the approval of and adoption by African Union (AU) member states.

The contributions in this 'focus' part deal with some of the most significant advances and remaining challenges in the African human rights system. These issues are, for example, the emerging expansion of socio-economic rights protection to include the right to water and sexual and reproductive rights; the exploitation of the African Charter as a pro-poor treaty; and the question whether the African Charter provides for the right to resist. One article discusses the situation in Libya, and the referral by the African Commission of the first case to the African Court on Human and Peoples' Rights (African Court). This case draws attention to the suitability and implementation of provisional measures or orders, as well as the relationship between the Commission and the Court. In this part, a number of prominent authors make innovative contributions to these and other contemporary debates.

In the second part of this issue, issues of broader relevance are canvassed. In some respects, these contributions enter into a conversation with conference papers, for example on the notion of *ubuntu* and solidarity, and on socio-economic rights. Other papers deal with matters of emerging concern, such as the economic empowerment of people with disabilities and the rights of victims of international crimes.

As has become customary, the concluding part of the *Journal* is devoted to 'recent developments'. The prevailing tension between the AU and the International Criminal Court is analysed against the background of the attempts to prosecute incumbent Sudanese President Al Bashir for crimes against humanity and war crimes, and his official visits to two AU member states, Chad and Kenya. In the last contribution, the meetings of the African Committee of Experts on the Rights and Welfare of the Child, in November 2010 and March 2011, are discussed. The authors argue that a 'new era' has dawned, and cite as evidence the strengthened collaboration with and role of civil society in the Committee's activities. They also discuss the finalisation of the first communication by the Committee. These are indeed encouraging developments – even if they are coming rather late in the day since the Committee has been in existence since 2002. It would be recalled that even though the African Charter on the Rights and Welfare of the Child entered into force in 1999, it was only in 2002 that the Committee met for the first time. This year therefore marks a decade in its existence. While this milestone has passed quietly, there are indications that the next decade would hold much more to celebrate.

We acknowledge with appreciation and sincerely thank the independent reviewers who gave their time and talents to ensure the consistent quality of the *Journal*: Prudence Acirokop; Atangcho Akonumbo; Jean Allain; David Bilchitz; Kealeboga Bojosi; Danny Bradlow; Amanda Cahill; Rebecca Cook; John Dugard: Solomon Ebobrah; Robert Eno; Charles Fombad; Ilze Grobbelaar-Du Plessis; Christof Heyns; Vinodh Jaichand; Waruguru Kaguongo; Grace Kamugisha; André Keet; Paavo Kotiaho; Muhammed Ladan; Christopher Mbazira; Benyam Mezmur; Anthony Munene; Tim Murithi; Salima Namusobya; Charles Ngwena; Martin Nsibirwa; David Padilla; Michael Reisman; Karen Stefiszyn; Sarah Swart; Bret Thiele; Samuel Tilahun; Ben Twinomugisha; Karin van Marle; Gordon Woodman; and Dunia Zongwe.

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Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives

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Summary

Various approaches to the adjudication of economic, social and cultural rights have developed out of jurisprudential and doctrinal debates around the justiciability of these rights. This article advocates for the application of both direct and indirect approaches to the justiciability of economic, social and cultural rights in the African human rights system. Under the direct approach, it argues for a model that combines the analysis of relevant provisions to identify normative standards and the evaluation of the conduct of states based on those standards. Under the indirect approach, it makes a case for the interdependent interpretation of substantive rights falling in different commonly-used categories to bridge gaps in the protection of specific economic, social and cultural rights and to ensure the coherent application of human rights norms. There is evidence in the jurisprudence of the African Commission on Human and Peoples' Rights that it applies both approaches. Its reasoning in many of the relevant decisions has, however, been lacking in the level of rigour, soberness, detail and consistency that is needed for a principled disposition of cases. The further development of its jurisprudence based on the evaluation of competing approaches to the justiciability of economic, social and cultural rights could increase the legal value of its decisions and the likelihood of their implementation.

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1 Introduction

In contrast with the prevailing trend at the time of its adoption, the African Charter on Human and Peoples' Rights (African Charter) clearly recognises the indivisibility of human rights,[1] and enshrining economic, social and cultural rights together with civil and political rights and collective rights. In addition to such cross-cutting rights as the rights to equality and non-discrimination and the right to dignity, the African Charter guarantees the right to equitable and satisfactory conditions of work, the right to health, the right to education and the right to culture.[2] It supplements these classic economic, social and cultural rights with such related rights as the right to property, the right to protection of the family, the right to economic, social and cultural development and the right to a satisfactory environment.[3]

The African Charter further subjected the aforementioned rights to monitoring by the African Commission on Human and Peoples' Rights (African Commission) – an 11-member quasi-judicial body with promotional and protective mandates.[4] Under its protective mandate, the African Commission is granted power to examine inter-state communications and 'communications other than those of states parties'.[5] Based on the latter provision, the Commission established its individual communications mechanism, under which it considers claims of violation of rights by individuals, groups or their representatives in an adversarial procedure and issues authoritative findings and remedies.

The protection of economic, social and cultural rights as substantive norms and their subjection to adjudicatory enforcement by the African Commission mean that the rights are generally justiciable. The establishment of the African Court on Human and Peoples' Rights (African Court) to complement the protective mandate of the Commission with a judicial mechanism of enforcement leading to binding judgments increases the justiciability of the economic, social and cultural rights protected under the African Charter.[6] Although the Charter does not provide for an exhaustive list and content of economic, social and cultural rights, the authorisation of the African Commission to draw inspiration from international human rights law and practice and

1 Preamble, para 7 African Charter on Human and Peoples' Rights, CAB/LEG/67/3/Rev 5 (1985).

2 Arts 2, 3, 5, 7 & 15-17 African Charter.

3 Arts 14, 18, 22 & 24 African Charter.

4 Arts 30 & 45 African Charter.

5 Arts 46-58 African Charter.

6 Arts 2 & 26-28 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/EXP/AFCHPR/PROT (III) (2004). A decision has been taken to merge the African Court with the Court of Justice of the African Union, resulting in the Protocol on the Statute of the African Court of Justice and Human Rights which is not yet in force.

the power of the African Court to enforce any relevant human rights instrument ratified by the states concerned may be used to close the normative gaps.[7] While the African Court has not yet handed down any relevant decision, the African Commission has developed a young economic, social and cultural rights jurisprudence from the small, but relatively sizable, number of pertinent cases.[8] The latter has over the years been applying and giving content to the terse economic, social and cultural rights provisions of the African Charter. Especially in its early days, the Commission's reasoning in its decisions lacked in proper analysis and rigour, but it has improved the quality of its arguments and findings.[9]

The article reviews the jurisprudence of the African Commission to see whether it has developed or followed principled approaches in the application of the economic, social and cultural rights provisions of the African Charter to actual cases. It measures the progress of the Commission's practice of adjudication of economic, social and cultural rights in comparison with approaches developed in other systems and provides perspectives for the further development of its jurisprudence. It argues for the application of methods of adjudication leading to well-reasoned decisions that ultimately increase the legitimacy, and hence compliance with the Commission's findings and recommendations.

2 Approaches to the justiciability of economic, social and cultural rights

Objections to the justiciability of economic, social and cultural rights, which question the legal nature of these rights and the competence of judicial and quasi-judicial organs to enforce them, fail to realise that there is 'no monolithic model of judicial enforcement for all human rights'.[10] Models of review that respect the limits of the power of adjudicatory organs and take the circumstances of each case into account

7 Arts 60-61 African Charter; arts 3 & 7 African Court Protocol.

8 Out of only 71 cases which the African Commission finalised on the merits by the end of 2009, it decided 13 cases involving claims of violations of one or more of the classic economic, social and cultural rights. If we add cases in which violations of the right to property and the right to protection of the family were found, the number jumps to 25, which is 35% of the cases decided on the merits by the end of 2009. There were some relevant pending cases at the time of writing.

9 For a review and characterisation of the African Commission's approach with regard to economic, social and cultural rights cases decided until 2003, see C Mbazira 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides' (2006) 6 *African Human Rights Law Journal* 333 342-353.

10 AA An-Na'im 'To affirm the full human rights standing of economic, social and cultural rights' in Y Ghai & G Cottrell (eds) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) 7.

respond to possible challenges to the justiciability of economic, social and cultural rights. Judicial or quasi-judicial organs may measure the compliance of the actions or inactions of states or their organs against standards that may be derived from provisions of human rights instruments. Approaches or models of adjudication or review are methods by which judicial or quasi-judicial organs derive the standards of evaluation from relevant legal provisions and apply them in their findings on specific issues.

Various approaches to the litigation and adjudication of economic, social and cultural rights have been developed and advanced in the practices of judicial and quasi-judicial organs and in scholarly writings.[11] They may be broadly categorised as direct and indirect approaches. Direct approaches are based on the argument that economic, social and cultural rights are directly enforceable by adjudicatory organs and they apply in systems where the rights are expressly protected as justiciable substantive norms. Indirect or interdependence approaches, which rely on the indivisibility, interdependence and interrelatedness of all human rights, are typically employed in systems where economic, social and cultural rights are not clearly or sufficiently protected in applicable legal instruments.

In the African human rights system where economic, social and cultural rights are protected as (quasi-) judicially enforceable substantive norms, direct approaches to the justiciability of the rights apply. Based on the integrated protection of the various groups of rights in the African Charter, the interdependence approach may also be used to close normative gaps in the Charter that result from the non-inclusion or incomplete protection of some economic, social and cultural rights. The latter is, in a way, an approach for the stronger protection and enforcement of economic, social and cultural rights in the system.

2.1 Direct approaches

In systems where a judicial or quasi-judicial organ has subject matter jurisdiction over clearly protected economic, social and cultural rights, direct approaches have been advocated and applied in the enforcement of negative (non-interference) as well as positive (action-oriented and resource-dependent) duties of states. Two such approaches are as follows: one that relies on the identification of the minimum essential elements of rights, and another that inquires into the reasonableness or justifiability of a state's action or inaction.

2.1.1 Minimum core model

Adopted first by the United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR Committee), the minimum core model

11 See T Melish *Protecting economic, social and cultural rights in the Inter-American human rights system: A manual on presenting claims* (2002) 193-357.

is a model for the 'assessment' of a state's action in the discharge of its obligations relating to economic, social and cultural rights based on whether it meets minimum essential levels of a right.[12] The model has since been a subject of doctrinal debate as a standard for monitoring and enforcement of economic, social and cultural rights. Young summarises the various approaches to the minimum core as those that identify an 'essential' minimum or absolute foundation for economic, social and cultural rights, those that seek minimum consensus surrounding these rights, and those that correlate the minimum core with minimum obligations.[13] Best exemplified by a definition of the core as the intrinsic and fundamental elements of rights, a normative understanding that identifies minimum entitlements and duties is the prevailing sense in which the minimum core model has been referred to.[14]

Much as it has the advantage of giving normative content to the seemingly crude obligation of 'progressive realisation' and serving as a standard against retrogressive measures, the minimum core model, especially as defined by the ESCR Committee, has limitations in terms of providing clear, simple, consistent and common standards of monitoring or adjudication.[15] The contents of the core have been expanding from 'immediately realisable' negative duties to positive obligations, including the provision of essential drugs and access to education and water facilities.[16] The definition of core obligations does not provide a clear mechanism or methodology for the identification of minimum duties. There is also a question as to whether the minimum core model is suitable for individual or group claims of economic, social and cultural rights.[17] Nonetheless, while the determination of minimum core entitlements and duties should be contextualised, the following may be considered common denominators of the various definitions: the negative obligations of non-interference and non-discrimination; the

12 United Nations Committee on Economic Social and Cultural Rights (ESCR Committee) General Comment 3 The nature of states parties' obligations *(*1990) paras 4 & 10.

13 K Young 'Conceptualising minimalism in socio-economic rights' (2008) 9 *ESR Review* 6 7-9.

14 See F Coomans 'In search of the core content of the right to education' in D Brand & S Russell (eds) *Exploring the core content of economic and social rights: South African and international perspectives* (2002) 166-167. See generally A Chapman & S Russell (eds) *Core obligations: Building a framework for economic, social and cultural rights* (2002).

15 For example, while the Committee makes failure to meet the core minimum exceptionally justifiable under General Comment 3 para 10, it says that the minimum core is non-derogable in General Comment 14, The right to the highest attainable standard of health (2000) para 47 and General Comment 15, The right to water (2003) para 40.

16 See General Comment 13, The right to education (1999) para 57; General Comment 14 para 43; General Comment 15 para 37.

17 See *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC) para 33.

duty to lay down a legal and policy framework for the realisation of rights, at least part of the duty to protect from the breach of rights by third parties; and the duty to prioritise those in urgent and desperate need. There is also no reason why the definition of such core obligations cannot apply in relation to individual as well as group claims of economic, social and cultural rights.

While adjudicatory organs in various systems have recognised and applied basic and fundamental elements of rights without necessarily using the minimum core concept,[18] the South African Constitutional Court considered the model as a competing approach of adjudication. The Court consistently rejected the idea of directly justiciable minimum core obligations based mainly on a lack of sufficient information, the diversity of needs and opportunities for the enjoyment of the core, the impossibility of giving everyone immediate access to the core and the competence of courts to determine the minimum core standard.[19] Although the difficulty of fully defining the core minimum that applies in all circumstances may be recognised, the Constitutional Court's insistence that it starts from obligations of states in the application of rights and that it does not do rights analysis is difficult to understand.[20] The Court may make a context-based incremental determination of the minimum core by starting with an analysis of rights provisions and the identification of their basic or fundamental elements. Nevertheless, the Court does not reject the minimum core model out of hand as it said that it may take it into account in determining whether measures adopted by the state are reasonable, rather than as a self-standing right conferred on everyone.[21]

In some of its early decisions, the African Commission enforced the 'basic' and 'immediate' elements of economic, social and cultural rights without expressly referring to them as the minimum core. In one such case it held that 'the failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine' constituted a violation of the right to health under article 16 of the African Charter.[22] Although the African Commission's conclusion is not based on a proper analysis of the normative contents of the right

18 See M Langford 'Judging resource availability' in J Squires *et al* (eds) *The road to a remedy*: *Current issues in the litigation of economic, social and cultural rights* (2005) 99-100.

19 *Grootboom* (n 17 above) paras 29–33; *Minster of Health & Others v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC) (*TAC*) paras 26–39. See also *Lindiwe Mazibuko & Others v City of Johannesburg & Others* 2009 ZACC 28 paras 52-58, 60-62 & 68 (rejecting the argument of the lower courts indicating the possibility of determining the minimum core in relation to the right to water).

20 See D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1.

21 *Grootboom* (n 17 above) para 33; *TAC* (n 19 above) para 34.

22 *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 47.

to health, the case exemplifies the use of basic or essential components of rights, which define the minimum core,[23] in the enforcement of the duty to fulfil the right to health. The finding in the same case that the closure of universities and secondary schools constitutes a violation of the right to education under article 17 of the Charter also coincides with the related minimum duties of states and the principle against retrogressive measures.[24]

The African Commission places a heightened responsibility on states and finds it easy to establish the violation of the right to health in conditions of detention. In a couple of cases it found a denial of access to doctors, and a lack of food, blankets and adequate hygiene in prisons in violation of the right to health under article 16 of the African Charter.[25] The Commission considers the pertinent positive duties of states to be immediate. If the minimum core of the right to health is to be defined in the context of prisons, it would most probably include the elements identified by the Commission. Reading between the lines, one may argue that the Commission's reasoning and findings indicate that the obligations of states to provide health services to prisoners and to maintain healthy prison conditions are among the core minimum of the right to health.

In its celebrated decision in a case that concerned the economic, social and cultural rights of the people of the Ogoni region of Nigeria, the African Commission used the minimum core language more clearly in enforcing the rights to shelter and food, which as shown further below were read into the African Charter through the interdependence approach.[26] First, the Commission observed that the fact that the government gave the green light to private actors to devastatingly affect the well-being of the Ogonis 'falls short of the minimum conduct expected of governments'.[27] It then said that the right to shelter 'at the very minimum' obliges the government to avoid destroying the housing of its citizens and obstructing their efforts to rebuild their homes and to prevent the violation of the right to housing by any other individuals, and found that the government of Nigeria 'has failed to fulfil

23 See ESCR Committee General Comment 14 para 43 (enumerating access to safe and potable water and the provision of essential drugs as part of the minimum core of the right to health). Note that the provisions of art 12(1) of the International Covenant on Economic Social and Cultural Rights, which the General Comment elaborates, resemble those of art 16(1) of the African Charter.

24 *Free Legal Assistance Group* (n 22 above) 48.

25 *Malawi African Association & Others v Mauritania* (2000) AHRLR 146 (ACHPR 2000) paras 121-122; *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 89-91; *International PEN & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) paras 111-112.

26 *Social and Economic Rights Action Centre & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*Ogoni* case) paras 58-68.

27 *Ogoni* case (n 26 above) para 58.

these two minimum obligations'.[28] The Commission further noted that 'the minimum core of the right to food requires' that the government should not destroy or contaminate food sources, allow private parties to do the same or prevent peoples' efforts to feed themselves, and held that 'the government's treatment of the Ogonis has violated all three minimum core duties of the right to food'.[29] It finally concluded that the Nigerian government 'did not live up to the minimum expectations of the [African] Charter'.[30]

The use of the minimum core language demonstrated that the African Commission has been following the jurisprudential debates about the definition of the normative content of economic, social and cultural rights.[31] The Commission considered the duties to respect (duty to refrain from interference with enjoyment of rights) and protect (duty to protect right-holders against third parties) the rights to housing and food as the minimum core obligations. It did so without engaging in a proper analysis and definition of the normative content of the rights it applied. Its understanding of minimum duties also does not fit perfectly with that of the ESCR Committee, which, for example, elaborated the minimum core of the right to food in terms of availability, acceptability and accessibility of food.[32] Nonetheless, the Commission applied the concept in connection mainly with duties of states which in any case are considered to be among the minimum contents of economic, social and cultural rights.

In a later decision in a case concerning mental health patients in The Gambia, the African Commission defined the obligations of state parties relating to the right to health as 'to take concrete and targeted steps' to realise the right 'without discrimination of any kind'.[33] Although it has not used clear minimum core language in this case, the Commission imported the standards which the ESCR Committee adopted in defining the nature of states' obligations in the General Comment in which it adopted the minimum core model for the first time.[34] It is probably for this reason that commentators close to the Commission considered its definition of the obligations of states in this case as an indication that it was 'leaning towards' or 'importing' the minimum core standard of the ESCR Committee.[35] Even though the latter does not specifically

28 *Ogoni* case (n 26 above) paras 61-62.

29 *Ogoni* case (n 26 above) paras 65-66.

30 *Ogoni* case (n 26 above) para 68.

31 F Coomans 'The *Ogoni* case before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749 757.

32 General Comment 12, The right to adequate food (1999) paras 8-13. See also Coomans (n 31 above) 756.

33 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 84.

34 General Comment 3 paras 1-2.

35 Mbazira (n 9 above) 353; F Viljoen *International human rights law in Africa* (2007) 240.

incorporate the duties identified by the Commission into its list of core obligations, they may be taken as the minimum of the positive obligations of states.

In applying the right to culture in the more recent case concerning the Endorois community of Kenya, the African Commission seems to have followed what Young called the 'essence approach' to minimum core.[36] After observing that imposing restrictive rules on culture 'undermines its enduring aspects', it found the threat to the pastoralist way of life of the Endorois community of Kenya by their relocation and the restriction of access to resources for their livestock to be a denial of 'the very essence of the Endorois' right to culture'.[37] This indicates that the obligation to refrain from imposing restrictions on cultural ways of life is an essential element of the right to culture that may be characterised as its minimum core. It is only that the Commission has not specifically used such language in this case.

While one may say, based mainly on the *Ogoni* case, that the minimum core model has generally formed part of the jurisprudence of the African Commission, it should also be acknowledged that the standards of review are not articulated sufficiently well as to make it a model of review of economic, social and cultural rights chosen and followed by the Commission. Its approach of considering the duties to respect and protect economic, social and cultural rights as minimum core obligations is also not a consistent one. It did not, for example, apply the model in its recent decision in the case relating to atrocities committed in the Darfur region of Sudan, where it found a violation of the right to property, the right to health and the right to development mainly because of the failure of the state to refrain from destructive acts and to protect the people of Darfur from the Janjaweed militia.[38] The Commission should engage in an analysis of applicable rights provisions and the prudent evaluation of models of review that suit the nature and circumstances of various cases. Wisely employed, the minimum core model that involves the scrupulous identification of essential or fundamental elements of rights and duties provides a principled approach to the justiciability of economic, social and cultural rights protected in the African Charter.

2.1.2 Reasonableness model

Judicial and quasi-judicial organs in national as well as international jurisdictions have inquired into the compatibility, justifiability or reasonableness of states' conduct in the light of their obligations relating to

36 Young (n 13 above) 7.

37 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case) paras 250-251.

38 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (*Darfur* case) paras 205, 212, 216 & 223. See text accompanying n 91/93 below.

socio-economic rights.[39] The reasonableness model developed by the South African Constitutional Court stands out as a veritable standard of review of positive duties that may also apply in other legal/human rights systems. The model escapes institutional legitimacy objections as it involves the scrutiny of government programmes for reasonableness without dictation or pre-emption of policy choices and by giving appropriate deference to the executive and legislative branches.[40] The government would be required to take steps where it has taken none, and to revise adopted measures to meet constitutional standards where they are found to be unreasonable.[41]

From the South African Constitutional Court's judgments in the relevant cases, a 'reasonable' programme must be comprehensive, coherent, co-ordinated, balanced and flexible; should make appropriate provision for short, medium and long-term needs; should not exclude a significant sector of society, and take account of those who cannot pay for the services; have appropriate human and financial resources; be both reasonably conceived and implemented; be transparent and involve realistic and practical engagement with concerned communities; provide relatively short-term relief for those whose situation is desperate and urgent; and be continually reconsidered to meet the needs of relatively poorer households. [42]

Some of the above criteria have also been applied by the United States Supreme Court in connection with a state's treatment programme for persons with mental disability[43] and by the European Committee of Social Rights in evaluating the compatibility of the conduct of states with positive obligations under the European Social Charter.[44] It is by taking these jurisprudential developments into account that the recent

39 See M Langford 'The justiciability of social rights: From practice to theory' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 3 43.

40 See D Brand 'Socio-economic rights and courts in South Africa: Justiciability on a sliding scale' in F Coomans (ed) *Justiciability of economic and social rights: Experiences from domestic systems* (2006) 227; CR Sunstein *Designing democracy: What constitutions do?* (2001) 222-23.

41 *Mazibuko* (n 19 above) para 67.

42 *Grootboom* (n 17 above) paras 39-43; *TAC* (n 19 above) paras 68, 78, 95 & 123; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* 2009 ZACC 16 paras 115-117; and *Mazibuko* (n 19 above) para 93. For the elaboration of some of the criteria, see S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 151-157.

43 *Olmstead v LC* 527 US 581 (1999) part III B 18-22 (whether the state had a comprehensive and effectively working plan and a waiting list that moved at a reasonable pace).

44 Eg, see Complaint 39/2006, *European Federation of National Organisations Working with the Homeless (FEANTSA) v France* (5 December 2007) paras 56-58; and Complaint 41/2001, *Mental Disability Advocacy Centre (MDAC) v Bulgaria* (3 June 2008) para 39 (applying such criteria as reasonable timeframe, measureable progress, meaningful statistics on needs, resources and results, regular reviews of the impact of the strategies adopted and special attention to vulnerable groups).

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) incorporated reasonableness as a predefined model of review for communications to be submitted to the ESCR Committee.[45]

The reasonableness model best exemplifies the adoption of an appropriate model of review as the ultimate response to objections to the justiciability of economic, social and cultural rights. While their association with policies is seen as an impediment to the justiciability of the rights, the reasonableness model shows that state policies meant to implement the rights can be reviewed by adjudicatory organs. Nevertheless, the reasonableness model, especially as developed by the South African Constitutional Court, has limitations in terms of responding to claims for direct socio-economic benefits for an individual or a class of individuals, throwing the burden of proof of the unreasonableness of the state's programme on the litigants and failing to link the reasonableness standard with more detailed elaboration of the content of specific rights.[46] It is in connection with its failure to do 'rights analyses' that the Constitutional Court has been urged to integrate the minimum core model – an argument which it openly rejected.

Despite the development of the reasonableness model in a domestic system quite close to it, the African Commission has an immature jurisprudence with regard to models of review applying to positive obligations. In the famous *Ogoni* case, in which it referred to the minimum core model, the Commission has not gone beyond underlining the obligation of states 'to take reasonable measures' in connection with the right to the environment.[47] Even though it only specified the measures that need to be taken without elaborating what constitutes 'reasonable' steps to achieve them, the observation of the Commission indicates that the general obligation of states under the African Charter to take 'legislative and other measures' should be interpreted as requiring 'reasonable measures' to realise economic, social and cultural rights. This can be a solid basis for the application of the reasonableness standard of review in the style of the Constitutional Court in relation to positive state obligations.

The African Commission has nevertheless applied what may be called a variant of the reasonableness model in evaluating states' conduct in cases concerning the infringement of property rights. It used the internal qualifiers of article 14 of the African Charter, which allow encroachment upon property in the interest of the public and

45 Optional Protocol to ICESCR (2008) art 8(4); B Porter 'The reasonableness of article 8(4) – Adjudicating claims from the margins' (2009) 27 *Nordic Journal of Human Rights* 39 46-50.

46 See Liebenberg (n 42 above) 308; S Liebenberg 'Enforcing positive socio-economic rights claims: The South African model of reasonableness review' in Squires *et al* (n 18 above) 83; Bilchitz (n 20 above) 9 19.

47 *Ogoni* case (n 26 above) para 52.

in accordance with the law, to require states to justify their actions affecting property rights. In a mass deportation case against Angola, for example, the Commission found a violation of the right to property because the state failed to provide a 'public interest' justification for its actions of deportation of foreign citizens that resulted in the confiscation and abandonment of their properties.[48] In the *Endorois* case, in which it interpreted the right to property as including a justiciable right to the use of land by an indigenous community without real title,[49] the Commission laid down more detailed requirements for the justification of encroachment upon property.

The African Commission examined the justifiability of the state's eviction of the Endorois from their ancestral land against the criteria of proportionality, participation, consent, compensation and prior impact assessment which it basically derived from article 14 of the African Charter.[50] It found the state in violation of the right to property as well as the right to development for its 'disproportionate' forced removal of the community, its failure to allow effective participation or hold prior consultation with a view to secure the consent of the Endorois, the absence of reasonable benefit enjoyed by the community, the failure to provide collective land of equal value or compensation after dispossession, and the failure to conduct prior environmental and social impact assessment.[51] It further noted that the standards derived from article 14 require the state to evaluate whether a restriction of the Endorois property rights is necessary to preserve the community's survival.[52] The standards of review applied in this case show by and large that the Commission examines the justifiability or reasonableness of states' actions that restrict the article 14 right to property or affect the right to economic, social and cultural development under article 22 of the African Charter. The standards helped the Commission in deciding the complex issues relating to the impact of states' development initiatives on the economic, social and cultural rights of a community.

There are also cases where the African Commission found violations of specific economic, social and cultural rights based on the impropriety of states' conduct in light of relevant provisions of the African Charter. It, for example, found the abrupt expulsion of foreign nationals without any possibility of due process to challenge the state's actions in violation of the victims' right to work.[53] The problem is that the Commission's reasoning in such cases is too short and shallow to allow the conclusion that it applied a proper model of review. With further

48 *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) *(IHRDA)* paras 72-73.

49 *Endorois* case (n 37 above) para 187.

50 *Endorois* case (n 37 above) paras 218 & 224-228.

51 *Endorois* case (n 37 above) paras 238 & 281-298.

52 *Endorois* case (n 37 above) para 267.

53 *IHRDA* (n 48 above) paras 74-76.

articulation and rationalisation, the style of reasoning in relation to the rights to property and development in the *Endorois* case may lead to the adoption of a model of review of positive duties. Especially the criterion of meaningful engagement with affected people, which is also an important element of the South African Constitutional Court's reasonableness model, may be used to address the democracy deficit that characterises the denial of economic, social and cultural rights in many parts of Africa.

2.1.3 Model of review combining minimum core and reasonableness standards

The previous sections show that both minimum core and reasonableness models are possible approaches to the direct justiciability of economic, social and cultural rights. While the minimum core model seems to be best suited to the justiciability of negative and 'basic level' positive obligations, the reasonableness model provides more advanced standards for the review of positive obligations. Whereas the former more or less concentrates on the content of rights to identify minimum entitlements and duties, the latter focuses on the obligations of states or measures to realise rights. They respectively use normative and more of 'empirical or sociological' standards of review. Both models also provide well for those in urgent need or vulnerable groups. These characteristics of the two models make it logical to conceive a model of review that combines elements or features of both.[54] Without an intention to exclude other possibly effective models, an approach that carefully combines the analysis of rights and obligations provisions and the evaluation of measures taken by a state against standards derived from such analysis could work well in practice.

There is no good practical example of a case where the 'combined approach' has been applied so far, but the ESCR Committee indicated in a statement issued in mid-2007 that it would apply standards that may broadly fall within such an approach. In elaborating the standards that it will apply in considering communications concerning an alleged failure of a state party to take steps to the maximum of available resources, the ESCR Committee stated that it would examine the adequacy or reasonableness of measures taken by the state based on a list of criteria that effectively encapsulated minimum core and reasonableness standards.[55] The 'combined model' appears to provide promising

54 See Bilchitz (n 20 above) 1-26.

55 Statement 'An evaluation of the obligation to take steps to the "maximum available resources" under an Optional Protocol to the Covenant' (10 May 2007). The criteria include that the measures taken towards the fulfilment of economic, social and cultural rights be deliberate, concrete and targeted, non-discriminatory and non-arbitrary, recognise the precarious situation of disadvantaged and marginalised individuals, and follow transparent and participative decision-making process. Elements of core obligations are also made part of the criteria in the examination of

standards of review of positive as well as negative obligations. It should, however, pay attention to the legitimacy and competence objections to the adjudicatory enforcement of economic, social and cultural rights and also to the limitations of the minimum core and reasonableness models indicated earlier. It should, for example, rein in the expanding definition of the minimum core and also allow provision for individual claimants at least in some circumstances.

Some of the ESCR Committee's standards of the 'combined model' were identified by the African Commission as measurements of the positive obligations relating to the right to health in the Gambian mental health case.[56] Although it has not expressly identified its reasoning with the minimum core or the reasonableness models in that case, its criteria of 'taking concrete and targeted steps and avoiding discrimination' may be applied in the evaluation of states' obligations relating to other economic, social and cultural rights. It is also interesting to see in this case that the African Commission made 'rights analysis' in defining the contents of the right to health in general and the right to mental health in particular.[57] It finally concluded that the impugned Lunatic Detention Act 'is lacking in terms of therapeutic objectives as well as provisions of matching resources and programmes of treatment of persons with mental disabilities' and found the state in violation of the right to health.[58] This is the result of an evaluation of the propriety or reasonableness of the legislative measure taken by the state to realise the right to (mental) health based on criteria derived through 'rights analysis'. Even though it lacks articulation as a proper model of review, the reasoning in the case shows an attempt at normative analysis and evaluation of the state's conduct against specific duties derived from applicable legal provisions.

Together with the jurisprudence in the *Ogoni* case, the *Endorois* case and other relevant cases where variants of either or both of the minimum core and reasonableness models have been applied, the reasoning of the African Commission in the Gambian mental health case may be used as a good starting point for the development of a 'combined model'.

2.1.4 Some remarks on the direct approaches of the African Commission

The study of cases it decided so far shows that the African Commission has been practically applying the right to work, the right to health, the right to education, the right to culture and other related rights. In the *Ogoni* case, it made the far-reaching observation that it 'will apply any

failure to take steps and retrogressive measures.

56 *Purohit* (n 33 above).

57 *Purohit* (n 33 above) paras 80-82.

58 *Purohit* (n 33 above) para 83.

of the diverse rights contained in the [African] Charter' and welcomed the 'opportunity to make clear that there is no right in the Charter that cannot be made effective'.[59] Considered a 'radical approach', for it sees all rights as equally enforceable,[60] the pronouncement of the African Commission confirmed the direct justiciability of the economic, social and cultural rights enshrined in the African Charter.

Although the Commission has been courageous in directly applying the economic, social and cultural rights provisions of the Charter, including in the most complex of cases involving resource-dependent duties and development policy issues, it has also exhibited serious reasoning deficits in many of the relevant cases it decided. In the early years of its existence, the Commission rushed to conclusions after merely summarising the complaints and citing applicable provisions of the Charter. Some of its more recent decisions show evolution towards more reasoned decision making.[61] Nonetheless, even at the current improved phase of the Commission's decisions, there is much to be desired in terms of a systematic analysis of facts and laws, evaluation of competing perspectives, soberness of findings, consistency in details and justification of remedies. The quality of decisions differs from one case to another. The shallowness and inconsistent quality of the reasoning of the Commission in many of the economic, social and cultural rights cases it decided is reflected in the underdevelopment of its jurisprudence with respect to models of review.

The African Commission's approach to the direct justiciability of rights in many of its decisions may basically be characterised as the mechanical application of provisions of the African Charter to the facts of the various cases. Seeing that the Commission often begins with a recital of the relevant rights and obligations provisions of the Charter, one would expect 'rights analysis' to find specific norms that apply to the particular circumstances of the cases. It creates an expectation that it will derive standards based on which it evaluates the action or inaction of the state in question. However, in many cases, the Commission made haste to reach conclusions, sometimes merely following the arguments of the complainants.

The African Commission has been attempting to develop its case law by referring to its own decisions and those of international as well as national human rights bodies based on article 61 of the African Charter.[62] It is unfortunate that it has not referred to the widely-cited jurisprudence of the South African Constitutional Court in its decisions

59 *Ogoni case* (n 26 above) para 68.

60 GJ Naldi 'The African Union and the regional human rights system' in M Evans & R Murray *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 20 30.

61 See Viljoen (n 35 above) 354.

62 *Ogoni* case (n 26 above); *Purohit* (n 33 above); *Endorois* case (n 37 above); *Darfur* case (n 38 above).

relating to economic, social and cultural rights. In the direct application of economic, social and cultural rights, the Commission may find it useful to begin with a 'rights analysis' to identify the normative contents of relevant provisions which may result in the definition of the minimum essential levels of rights. The specific normative standards may then be used for the evaluation of states' conduct. An approach combining facets of the minimum core and reasonableness models may work well in the African system if accompanied by the rationalisation of the definition of the core and the criteria of reasonableness. The reference to the minimum core model in the *Ogoni* case, the application of a variant of the reasonableness standard in the *Endorois* case, and the brief combination of rights analysis and evaluation of the state's measure against specifically identified duties in the Gambian mental health case may be used as starting points for the development of a more comprehensive model of review of economic, social and cultural rights in the African system. This is not, however, to foreclose the development of other suitable models that do not necessarily rely on the ones discussed above.

2.2 Interdependence approach

The interdependence approach is a method of judicial or quasi-judicial enforcement of economic, social and cultural rights that relies on process and procedural rights that are common to all groups of rights (including the right to equality and non-discrimination), and the overlapping components of substantive rights normally placed in different categories. It is based on the intertwinement of human rights and seeks to undermine their artificial categorisation and create a coherent human rights norm system. The integrated protection of different groups of rights which are clearly stated to be indivisible and interdependent in the African Charter provides a solid basis for the approach.[63] It is probably for this reason that the African Commission declared in one of its economic, social and cultural rights decisions that it is 'more than willing to accept legal arguments' that take into account the principle that 'all human rights are universal, indivisible, interdependent and interrelated'.[64] The requirement that the Commission draw inspiration from other international human rights instruments and the African Court's broad subject matter jurisdiction widen the substantive basis for their interdependence approach as they allow the cross-fertilisation of human rights norms or contents across treaties.[65]

The interdependence approach has been put to creative use in systems where there are substantive and procedural gaps in the protection of economic, social and cultural rights. The UN Human Rights Committee

63 Preamble, para 7 African Charter.

64 *Purohit* (n 33 above) para 48.

65 Arts 60-61 African Charter; arts 3 & 7 African Court Protocol.

and the European Court of Human Rights gave socio-economic rights dimensions to the cross-cutting rights to non-discrimination and a fair trial, respectively, especially in cases concerning social security.[66] The two organs have also shown some interest in making use of the interdependence between substantive rights. The European Court, for example, protected the right to work by reading together provisions on non-discrimination and the right to respect for private life, and also indicated that the right to life covers aspects of the right to health.[67] The Human Rights Committee read socio-economic aspects into the right of members of minorities to enjoy their own culture in community with others.[68] The Inter-American Court of Human Rights has also affirmed the justiciability of indigenous land and resource rights through the right to property and the right to judicial protection.[69] The right to property, which is often enshrined in instruments devoted to civil and political rights, has also been used for the protection of components of such economic, social and cultural rights as the rights to housing and social security.[70]

The most robust utilisation of the approach based on the interdependence of substantive rights is to be found in the jurisprudence of the Indian Supreme Court where the right to life has been interpreted as including the right to a livelihood, the right to health care, the right to shelter, the right to the basic necessities of life, such as adequate nutrition, clothing and reading facilities, the right to education, and the right to just and human conditions of work.[71] While the understanding of the interdependence among substantive rights is good, care should

66 For the analysis of relevant cases, see M Scheinin 'Economic and social rights as legal rights' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2001) 32-38; C Krause & M Scheinin 'The right not to be discriminated against: The case of social security' in T Orlin *et al* (eds) *The jurisprudence of human rights law: A comparative interpretive approach* (2000) 259-264.

67 *Sidabras & Dziautas v Lithuania* (2004) 42 EHRR 104 paras 50 & 62; *Zdzislaw Nitecki v Poland*, application 65653/01, decision, ECHR (2002) para 1.

68 M Scheinin 'The right to enjoy a distinct culture: Indigenous and competing uses of land' in Orlin *et al* (n 66 above) 164-168.

69 *Mayanga (Sumo) Awas Tingni Community v Nicaragua* IACHR (2001) Ser C 79 paras 137-139 & 148-155.

70 *Akdivar & Others v Turkey* application 21893/93, ECHR 1998-II 69 (1998) (finding forced evictions and destruction of housing in violation of the right to property); *Gaygusuz v Austria*, application 17371/90, ECHR 1996-IV 14 (1996) para 41 (social benefits as pecuniary rights covered by the right to property); and *Case of the 'Five Pensioners' v Peru* IACHR (2003) Ser C 98 paras 102, 103 & 121 (finding arbitrary changes in the amount of pensions to be in violation of the right to property).

71 *Tellis & Others v Bombay Municipal Corp & Others* (1987) LRC (Const) 351; *Pashim Banga Khet Mazdoor Samity v State of West Bengal* (1996) AIR SC 2426; *Shantistar Builders v Narayan Khimalal Totame & Others* (1990) 1 SCC 520; *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & Others* (1997) AIR SC 152; *Francis Coralie Mullin v The Administrator Union Territory of Delhi* (1981) 2 SCR 516 529; *Jain v State of Karnataka* (1992) 3 SCC 666; *Krishnan v State of Andhra Pradesh & Others* (1993) 4 LRC 234; *Bandhua Mukti Morcha v Union of India* (1984) 2 SCR 67.

be taken with regard to the extent to which the right to life or any other right may be expanded.[72] Interpretations should be able to show a genuine substantive interrelationship between the rights in question or their components.

As indicated earlier, the application of the interdependence approach is not limited to systems where there are substantive and/or procedural gaps in the protection of economic, social and cultural rights. In the African system, the approach can be used to bridge gaps and strengthen the protection of economic, social and cultural rights. The African Charter enshrines rights that are not commonly categorised under economic, social and cultural rights but may serve as bases for the enforcement of the latter. These rights include the cross-cutting rights to non-discrimination or equality, equal protection of the law, and a fair trial; the highly permeable substantive rights to life and dignity; the instrumental right to freedom of movement, including the rights of non-nationals; the right to equal access to public property and services; and the multi-faceted right to property and development-related rights, which may also be treated as economic, social and cultural rights.[73] In its practice, the African Commission is inclined to see all human rights as interconnected set of values and used some of the aforementioned rights for its interdependence approach. It has also utilised the approach to protect economic, social and cultural rights that are not expressly incorporated in the African Charter.

2.2.1 Interdependence approach in the jurisprudence of the African Commission

The African Commission in many cases underscored the value of the rights to non-discrimination and equal protection of the law under articles 2 and 3 of the African Charter respectively as the foundations for the enjoyment of all other rights.[74] It observed that equality or lack of it 'affects the capacity of a person to enjoy many other rights' and presented the goals of article 2 as 'the elimination of all forms of discrimination (in all its guises) and to ensure equality among all human beings' .[75] It indicated in one case that individuals may successfully establish a claim for a violation of the right to equal protection of the law by showing that the state has not given them the same

72 See T Melish 'Rethinking the "less as more" thesis: Supranational litigation of economic, social and cultural rights in the Americas' (2006) 39 *New York University Journal of International Law and Politics* 326-327.

73 Arts 2, 3, 4, 5, 7, 12, 13(2) & (3), 14, 19 & 20-22 African Charter.

74 *Purohit* (n 33 above) para 49; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 169.

75 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 63; *Malawi African Association* (n 25 above) para 131; *Purohit* (n 33 above) para 49; *IHRDA* (n 48 above) para 78; *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire* (2008) AHRLR 75 (ACHPR 2008) para 87.

treatment it accorded to others.[76] In another decision it demonstrated the applicability of the equality provisions of the African Charter to the protection of the economic rights of individuals or peoples in a state party. It found the requirement of the use of the French language for the registration of companies in anglophone Cameroon and the concentration and relocation of business enterprises and economic projects in francophone Cameroon in violation of articles 2 and 19 of the African Charter.[77] In the Gambian mental health case, the African Commission implied that it expected states to provide legal aid and assistance to vulnerable groups and found that the absence of such legal aid failed to meet the standards of anti-discrimination and equal protection of the law under the African Charter.[78] The foregoing review shows the actual and potential relevance of the cross-cutting rights to equality and non-discrimination to the interdependence approach of the African Commission.

The African Commission has repeatedly applied the right to dignity and the related right against inhumane and degrading treatment that are protected under article 5 of the African Charter in an approach of interdependence of substantive rights.[79] It positions the right to dignity as an inherent right or a primordial and foundational value that underlies all human rights.[80] Violations of many economic, social and cultural rights would meet the African Commission's standards of 'unfair treatment, so as to result in [one's] loss of worth and integrity' and '[feeling] devalued, marginalised, and ignored' for the violation of the right to dignity.[81] The Commission also recognises the potential of the permeable right to life to be used in an interdependent approach to cover issues of livelihood and facets of such rights as the rights to health and food.[82]

In detention cases where the main issues concerned such civil and political rights as the right to personal liberty and the right against arbitrary detention, the African Commission found detention in dark, overpopulated or 'roofless' facilities under conditions of poor hygiene, insufficient food and/or a lack of access to medicine and medical care, and without access to family members, to be inhuman and degrading forms of treatment constituting a violation of article 5 of the African

76 See *IHRDA* (n 48 above) paras 45-48.

77 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) paras 102-108 & 162.

78 *Purohit* (n 33 above) paras 34-38 & 52-54.

79 The right to the respect of the dignity inherent in a human being under this article is taken as a self-standing right that may be applied to a wide range of cases. Eg, see *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 58; and *Malawi African Association* (n 25 above) para 135.

80 See *Purohit* (n 33 above) para 57; and *Darfur case* (n 38 above) para 163.

81 *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) para 49.

82 See *Darfur* case (n 38) para146.

Charter.[83] The findings demonstrate the fundamental nature of the right against inhuman and degrading treatment and its interdependence with aspects of the rights to health, housing, food and the right to family life. In establishing a link between these rights and the basic right to life in one of the cases, the Commission further observed that denying detainees food and medical attention pointed to a shocking lack of respect for life and constituted a violation of article 4 of the African Charter.[84] Its findings of violations of other specific civil and political rights as well as economic, social and cultural rights, such as the right to health and the right to protection of the family, in some of the detention cases demonstrate the Commission's understanding of the various rights in the Charter as interdependent in practice. The cases also exemplify the utilisation of the interdependence approach based on rights that normally fall in the category of civil and political rights to reinforce the protection of economic, social and cultural rights. It is only unfortunate that the Commission failed to engage in the analysis of the normative contents of the relevant provisions of the Charter in order to show the interdependent components of the various rights.

In a case involving claims of slavery and exploitation in Mauritania, the African Commission further demonstrated the interdependence between the right to dignity under article 5 and the right to work. It emphasised that 'unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being'.[85] The argument of the Commission shows that the right to dignity can be interpreted to protect substantive aspects of the right to work that are not clearly covered by the provisions of article 15 of the African Charter. However, it is not clear why the Commission failed to refer to this latter article while reciting provisions of the Universal Declaration of Human Rights and ICESCR on the right to just and favourable remuneration through what may be called 'cross-treaty interdependence of substantive rights'.

In the *Ogoni* case, the African Commission used the interdependence approach in a more advanced way to find normative bases for the protection of the rights to shelter and food that are not clearly incorporated in the African Charter. Based on the interdependent interpretation of the Charter provisions, it read the right to food into the rights to life, to health and to development, and the right to housing into the

83 *Civil Liberties Organisation v Nigeria* (2000) AHRLR 243 (ACHPR 1999) paras 5, 25 & 27; *Constitution Rights Project & Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999) paras 5 & 28; *Malawi African Association* (n 25 above) paras 116 & 118; *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000) paras 40-41; and *IHRDA* (n 48 above) paras 49–53. See also *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 54.

84 *Malawi African Association* (n 25 above) para 120.

85 *Malawi African Association* (n 25 above) para 135.

rights to property, to health and to family life.[86] In deriving the right to housing, the Commission argued that the corollary of the combination of the provisions of the Charter protecting the rights to property, to health and to family life 'forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected'.[87] It observed in a further illustration of the substantive interdependence of rights that 'the right to food is inseparably linked to the dignity of human beings and is, therefore, essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation'.[88] The African Commission exploited the interdependence between substantive socio-economic and civil and political rights for the purpose of filling gaps in the protection of economic, social and cultural rights.

In the more recent *Darfur* case, despite the request of one of the applicants that it follow the *Ogoni* case approach of reading rights into the African Charter,[89] the African Commission used the facts of the case that relate to the rights to housing, food and water to find a violation of article 5. It argued that the forced eviction of civilian population from their homes and villages, and the destruction of their houses, water wells, food crops, livestock and social infrastructure by the state and its agents amount to cruel, inhuman and degrading treatment that threatened the very essence of human dignity.[90] In a typical approach of interdependence of substantive rights, the Commission interpreted 'the right to dignity and against cruel and inhuman treatment' as covering facts which, taken separately, would also constitute violations of the right to property as well as the rights to housing, water and food. While one may wonder if the approach in the *Darfur* case signifies a change in the Commission's approach of 'reading missing rights into the Charter', members of the Commission who were part of the decision disagree.[91]

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86 *Ogoni* case (n 26 above) paras 59-60 & 64-65. (In the case of the right to food, the African Commission basically accepted the interdependence argument advanced by the communication.)

87 *Ogoni* case (n 26 above) para 60.

88 *Ogoni* case (n 26 above) para 65.

89 *Darfur* case (n 38 above) paras 112-126. (The applicant requested the African Commission to read the rights to housing and food into the African Charter and to develop its jurisprudence further by reading the right to water into some specific provisions.)

90 *Darfur* case (n 38 above) paras 155-164 & 168.

91 Interviews with Commissioners Mumba Malila (on 12 November 2009); Faith Pansy Tlakula (on 14 November 2009), Catherine Dupe Atoki (on 14 November 2009); Yeung Kam John Yeung Sik Yuen (on 16 November 2009); and Musa Ngary Bitaye (17 November 2009) (all arguing for reading rights into the African Charter based on the interdependence of human rights).

The African Commission also showed that it may use the right to property under article 14 of the African Charter in the interdependence approach to cover the physical aspects of the right to an adequate standard of living, including shelter, food and water. The *Ogoni* case illustrates the interdependence between the right to property and the right to housing. In the *Darfur* case, the Commission found Sudan in violation of the right to property for it failed to refrain, and protect victims, from eviction or demolition of their houses.[92] In the case against Mauritania, it similarly found the expropriation and destruction of the houses of black Mauritanians before forcing them to go abroad a violation of the right to property.[93] The cases demonstrate the interdependence between the right to property and the right to housing, which directly relates to the core violation. In accordance with the jurisprudence of the Inter-American and European Courts, the African Commission may also systematically apply the right to property for the protection of some aspects of the right to social security (social benefits including pension) which is not clearly incorporated in the African Charter.

Finally, deportation cases present a special example of the interdependence approach that relies on the cross-cutting right to non-discrimination and the substantive interdependence between aspects of the right to movement (or the right of non-nationals) under article 12 of the African Charter and specific economic, social and cultural rights. Without foreclosing the possibility of deportation of non-nationals, the African Commission observed that the mass expulsion of any category of persons constituted a 'flagrant' or 'special' violation of human rights.[94] It also stated in a case concerning the nationality of an individual that 'deportation or expulsion has serious implications on other fundamental rights of the victim, and in some instances, the relatives'.[95] The Commission quite logically depicted mass expulsion or deportation as an action of compound effects that entails the violation of a range of rights, including the rights to property, to work, to education and to the protection of the family.[96] It further found the measures of mass expulsion to be discriminatory and hence in violation of the

92 *Darfur* case (n 38 above) para 205.

93 *Malawi African Association* (n 25 above) para 128.

94 *Rencontre Africaine pour la Défense de Droits de l'Homme (RADDHO) v Zambia* (2000) AHRLR 321 (ACHPR 1996) paras 20 & 31; *Union Inter-Africaine des Droits de l'Homme & Others v Angola* (2000) AHRLR 18 (ACHPR 1997) paras 15-16, *IHRDA* (n 48 above) paras 63 & 67-69; *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004) paras 69 & 71.

95 *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000) para 90.

96 *Union Inter-Africaine* (n 94 above) para 17 (but a violation of arts 15 and 17 was not found in the operative part of the decision). See also *Modise* (n 95 above).

cross-cutting right to non-discrimination.[97] It is the discriminatory nature of the expulsions (including on the enjoyment of the economic, social and cultural rights of the deportees) that made them rights-violating acts. Although the African Commission was too brief in its arguments, in the mass expulsion cases it has laid down a basis for an interdependence approach by which articles 2 and 12 of the African Charter may be used as vehicles for the protection of economic, social and cultural rights.

The decisions of the African Commission in the above-reviewed cases show that it has been making use of the interdependence approach in enforcing economic, social and cultural rights. They demonstrate the Commission's understanding of human rights as an interdependent and coherent set of values. In some of the cases, the Commission related the main issues of the complaints to specific economic, social and cultural rights in very general terms or only tangentially. Although the arguments of the Commission were not detailed enough in terms of clearly setting out the interdependent elements of specific rights falling in different commonly used categories, the interdependence approach helped it to bridge normative gaps in the justiciability of economic, social and cultural rights.

3 Conclusion

Both the direct and interdependence approaches to the justiciability of economic, social and cultural rights apply in the African human rights system. The direct justiciability of the rights protected under the African Charter should not make the interdependence approach irrelevant. The latter should not also overshadow or undermine the justiciability of economic, social and cultural rights in their own right. Nor should the approaches be seen as necessarily separate and self-standing methods of adjudication of economic, social and cultural rights as both of them may sometimes apply in one and the same case.

The African Commission has directly applied many of the economic, social and cultural rights provisions of the African Charter. It made some use of models of review applied in the adjudication of economic, social and cultural rights cases in other systems. It also utilised the interdependence approach for the protection of economic, social and cultural rights (through equality rights and civil and political rights) and also to find substantive bases for economic, social and cultural rights that are not protected in the African Charter. However, in many of its relevant decisions, the Commission made hasty findings and conclusions without defining a method of inquiry. Even though the quality of reasoning of the Commission has been improving, it is still

97 *RADDHO* (n 94 above) paras 20-25; *Union Inter-Africaine* (n 94 above) para 18; and *IHRDA* (n 48 above) paras 77-80.

somewhat difficult to talk of a model of review of economic, social and cultural rights that has been chosen and applied or developed in the African system. It should show greater soberness and make a jurisprudential probe in interpreting and applying provisions on economic, social and cultural rights to actual cases. Its interdependence approach should also engage in proper normative analysis to identify the overlapping components of rights. Reasoned decisions with principled and consistent arguments increase the likelihood of compliance with the remedies that the African Commission issues.

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The human right to water in the *corpus* and jurisprudence of the African human rights system

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Abstract

The effects of the absence of an explicit and comprehensive protection of the human right to water in the African Charter on Human and Peoples' Rights have been somewhat mitigated by the African Commission on Human and Peoples' Rights' purposive approach to the interpretation of other guarantees of the African Charter in a manner that envelopes the right to water. The African Commission grounded the legal basis of the right in provisions guaranteeing the right to health, the right to a healthy environment and the right to dignity. Yet, the Commission has failed to fully explain the normative status and content of the right. There also remains doubt as to whether the right is an autonomous entitlement per se *or is an auxiliary guarantee that is used to ensure the realisation of other rights of the Charter. Besides, the legal basis of the right is rendered diffuse as the African Commission has located it in differing rights on a case by case basis. This has left the right to water on shifting and amorphous legal bases and entailed normative problems for the right holders as well as duty bearers. The article argues that the Commission has grounded the right on a narrowly-defined legal basis. It also contends that the Commission should follow the approach of the United Nations Committee on*

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Economic, Social and Cultural Rights' General Comment 15 (2002), which declared an autonomous right to water and defined its normative content and related states' obligations.

1 Introduction

> [M]ay you live, and all your people. I too will live with all my people. But life alone is not enough. May we have the things with which to live it well. For there is a kind of slow and weary life which is worse than death.[1]

A great deal of scholarship on socio-economic rights in the African human rights system has focused on the analysis of problems of enforcement and justiciability of this group of rights. Consensus has emerged that the justiciability and enforcement of socio-economic rights guarantees of the African Charter on Human and Peoples' Rights (African Charter)[2] have for the most part played second fiddle to their civil and political counterparts enshrined in the African Charter.[3] However, the marginalisation of socio-economic rights of the Charter is also characterised by the brevity of the catalogue of this group of rights that have found an explicit expression in the regional instrument. The Charter has given recognition only to a select list of socio-economic rights.[4] It has also omitted to explicitly provide for a few crucial socio-economic guarantees.[5] In short, its catalogue of socio-economic rights is modest.[6]

One of the crucial guarantees to have eluded the list of African Charter socio-economic rights is the right to drinking water and water for sanitation. Lacking a comprehensive legal protection in the main regional instrument, the human right to water creates a hierarchy within a hierarchy, as it sits on the lowest rung of the already-marginalised socio-economic rights. The right has found its way into regional jurisprudence only by dint of innovative interpretation of the Charter

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1 Prayer of Ezeulu (Ulu's chief priest) in C Achebe *Arrow of God* (1964) 95.

2 African Charter on Human and Peoples' Rights, adopted 27 June 1981; entered into force 21 October 1986, reproduced in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29.

3 TS Bulto 'The utility of cross-cutting rights in enhancing justiciability of socio-economic rights in the African Charter on Human and Peoples' Rights' (2010) 29 *The University of Tasmania Law Review* 142; C Heyns 'Civil and political rights in the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 137; CA Odinkalu 'Analysis of paralysis or paralysis by analysis? Implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327.

4 See, eg, 'the right to work under equitable and satisfactory conditions' (art 15); 'the right to enjoy the best attainable state of physical and mental health' (art 16); and 'the right to education' (art 17).

5 See Bulto (n 3 above) 143.

6 C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Penn State Law Review* 679 690.

by its monitoring and enforcement mechanism, the African Commission on Human and Peoples' Rights (African Commission). While this is a step in the right direction, the African Commission approached the right from an overly narrow normative basis and failed to elaborate its normative content. Even so, the Commission has yet to define comprehensively the legal basis and scope of the human right to water and attendant state obligations under the Charter.[7]

The article explores the case law of the African Commission on the human right to water and analyses it in light of developments elsewhere. It seeks to demonstrate that, despite its innovative approach to locating the human right to water in the African Charter's *corpus*, the Commission has conspicuously failed to elaborate its normative basis and content and turned a deaf ear when victims of the right's violations sought remedies before it. It also suggests that the Commission grounded the human right to water on a narrowly-defined and usually shifting legal basis, ignoring the fertile normative sources of the right in related African Union (AU) treaties. The article argues that the human right to water in Africa should be grounded not only in the implicit terms of the African Charter, but also in the more explicit provisions of the usually neglected African Convention on the Conservation of Nature and Natural Resources (African Nature Convention).[8] It seeks to examine the right and its normative content through the analysis of the broader African regional instruments and their 'inspirational sources' in the universal treaties.

The next section discusses the textual basis of the right to water in mainstream regional human rights treaties and analyses the case law of the African Commission and the potential utility of other continental treaties, the primary focus of which is not on human rights. In section 3, the analysis focuses on the inspirational value of the approach of the global human rights bodies in carving the right to water from similarly obscure normative sources. Section 4 relies on these non-African approaches to the normative scope of the human right to water, and argues that a similar approach may be adopted by the African Commission. Section 5 draws the analysis together to conclude the study.

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7 In 2009, the African Commission had drafted and circulated for comment a 'Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' which contained a specific section on the 'right to water and sanitation'. The draft guidelines devoted paras 71-75 to the analysis of the legal basis and normative content of the right to water and sanitation. However, at the date of writing, the final version has not been made public. Thus, as the analysis of a draft document would not add much value to the debate, it is not discussed here.

8 African Convention on the Conservation of Nature and Natural Resources, adopted on 15 September 1968, entered into force on 16 June 1969. According to the publicly available data on the website of the AU, as at 30 August 2011, the African Nature Convention was ratified or acceded to by 30 of the 53 member states of the AU. See status of ratifications http://au.int/en/sites/default/files/Nature_and_Natural_Resources.pdf (accessed 20 June 2011).

2 Normative basis of the human right to water in the African Charter

The absence of a comprehensive guarantee of the human right to water in the universal human rights treaties has variously been dubbed 'odd, at best'[9] and 'startling'.[10] Its analogous absence in the African Charter[11] is disquieting, given the degree of water scarcity on the continent. Humans can survive more than a month without food, but only about a week without water, as their bodies are between 60 and 80 per cent water by weight, depending upon the individual.[12] In the Millennium Development Goals, countries of the world could promise merely to halve the number of people without access to drinking water and water for sanitation.[13] Africa faces 'steep challenges' just to meet this minimalist yet seemingly ambitious undertaking,[14] a fact that lends urgency to an examination of the legal basis of the human right to water on the continent.

2.1 Right to water in the mainstream African human rights instruments

In contrast to the total absence of any mention of the right to water under the African Charter, the African Charter on the Rights and Welfare of the Child (African Children's Charter)[15] provides that state parties are required to take measures to 'ensure the provision of adequate nutrition and safe drinking water'.[16] The ambit of the provision in the African Children's Charter is so limited that it merely regulates the quality (safety) of available water and applies only to children.

It is silent on the (adequacy of the) amount of water that states have to provide to children. Similarly, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African

9 SC McCaffrey 'The basic right to water' in EB Weiss *et al* (eds) *Fresh water and international economic law* (2005) 93 94.

10 M Craven 'Some thoughts on the emergent right to water' in E Riedel & P Rothen (eds) *The human right to water* (2006) 37 39.

11 A qualified recognition of the human right to water has been made in other regional treaties, but the normative status of the right remains auxiliary to other related but more explicit rights. See TS Bulto 'Rights, wrongs and the river between: Extraterritorial application of the human right to water in Africa' unpublished PhD thesis, Melbourne Law School, University of Melbourne, 2011 (on file with author).

12 SC McCaffrey *The law of international watercourses: Non-navigational uses* (2001) 3.

13 See the UN Millennium Development Goals Report 2009 46.

14 UN Millennium Development Goals Report 2009 (n 13 above) 45-46.

15 African Charter on the Rights and Welfare of the Child, adopted 11 July 1990, entered into force 29 November 1999, reproduced in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 77.

16 Art 14(2)(c) African Children's Charter.

Women's Protocol)[17] provides that state parties shall take 'appropriate measures to ... provide women with access to clean drinking water'.[18] This instrument also says nothing about the quantity of water that is to be provided by states to the beneficiaries of the right.

Accordingly, the normative content and legal basis of a free-standing and comprehensive right to water are ambiguously situated in the mainstream regional human rights instruments. However, there are additional legal bases upon which the African Commission can rely to 'discover' the human right to water. There is room for interpreting the African Charter's provisions in a way that allows the 'reading-in' of an independent human right to water. Besides, there is a potential to use other African treaties, that are not specifically human rights instruments but have relevance thereto, in order to give legal protection to the right. However, the potential for explicating the human right to water from the relevant regional treaties depends heavily upon how the African Commission approaches claims and complaints related to the human right to water. As discussed below, the human right to water in the case law of the Commission has had a troubled history.

2.2 Approach of the African Commission

The recognition of the human right to water in the African human rights system – to the extent that it exists at all – owes its roots to a quasi-judicial innovation of the African Commission. The Commission read the right to water into or from other rights that have been clearly provided for in the regional instruments. The promotional mandate of the Commission enunciated under article 45 of the African Charter empowers the regional body to set standards and formulate principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms. This has enabled the Commission to read aspects of the right to water into other guarantees of the African Charter.

So far, the African Commission has mainly interpreted the right to water as a sub-set of the right to dignity (article 5), the right to health (article 16) and the right to a healthy environment (article 24). In *Free Legal Assistance Group and Others v Zaire*, the Commission held that the 'failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine ... constitutes a violation of article 16 [right to health]'.[19] Similarly, in a landmark case against Nigeria, the Commission decided that contamination of sources of drinking water by state or non-state actors is a violation of

17 Adopted 13 September 2000, entered into force 25 November 2005, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 61.

18 Art 15(a) African Women's Protocol.

19 *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 47.

article 16 (the right to health) and article 24 (the right to a satisfactory environment).[20] In a case against Sudan, there was a complaint that Sudan was complicit in poisoning wells and denying access to water sources in the Darfur region.[21] Here, too, the African Commission ruled that 'the poisoning of water sources, such as wells, exposed the victims to serious health risks and amounts to a violation of article 16 of the Charter'.[22] Despite a clear and emphatic request from the complainants to declare the existence of an independent right to water under the African Charter (and the violations thereof in the instant case), the Commission evaded the request without any reasoning whatsoever. Indeed, the Commission itself stated that '[t]he complainant invites the Commission to develop further its reasoning in the *SERAC* case by holding that the right to water is also guaranteed by reading together articles 4, 16 and 22 of the African Charter'.[23] For a quasi-judicial body such as the African Commission to bypass a clear prayer of the complainants without an apparent reason in a case involving such massive and serious violations of vital human rights, including the human right to water, is anomalous, to say the least. Despite a golden opportunity to rule on the status and legal basis of the human right to water, the African Commission neglected to do this.

Similarly, in a case against Angola, in which the present author was one of the legal counsel for the complainants, it was proven that Angola carried out massive arrests of foreign nationals (in which over 126 247 individuals were arbitrarily arrested *en masse*) and put them in detention centres before deporting them. In these detention camps – some of which were initially used to house animals and contained a plethora of animal waste, thus far from suitable for human habitation –complainants were provided with bathroom facilities consisting solely of two buckets of water per day for over 500 detainees. Worse, the bathroom was located in the same room where all detainees were compelled to eat and sleep. Yet, the African Commission could only find the respondent state in violation of the right to dignity and the protection against inhuman and degrading treatment. It ruled that the situation is 'clearly a violation of article 5 of the African Charter since such treatment cannot be called anything but degrading and inhuman'.[24] There was no attempt by the African Commission to explicate the right to water and no mention of the manifestly gross violations of the right that were committed by the respondent state.

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20 See *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (*SERAC* case) (2001) AHRLR 60 (ACHPR 2001) paras 49, 50-54, 57 & 66.

21 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (*Sudan*) para 207.

22 *Sudan* (n 21 above) para 212.

23 *Sudan* (n 21 above) para 126.

24 *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) para 51.

The African Commission's approach to the human right to water has therefore consistently been to treat it as an auxiliary right that attracts protection as a component of other more explicit rights. This has been the case not only in the Commission's jurisprudence, but also in the Pretoria Statement on socio-economic rights of the Charter, where the right to health (article 16) was taken to entail 'access to basic ... sanitation and adequate supply of safe and potable water'.[25] While this approach is not entirely wrong, it represents a mixed blessing for the progressive development of the human right to water under the Charter. The derivative approach to explicating the right is a double-edged sword, as it carries potentially contradictory implications about the legal basis of the right.

On the positive side, the Commission stated the obvious stance that the right to water is a necessary and inherent element, *inter alia*, of the rights to health, life, dignity and housing. Since the more explicit (parent) rights cannot be realised without access to adequate quality and quantity of water, the human right to water would be treated as part and parcel of such rights.[26] Thus, the right to water springs out of the necessity for the realisation of other explicitly-guaranteed rights.

The negative repercussions of the approach arise from the positive implication. Critics of the derivative approach argued that the right to water, as derived from such rights as the right to health and the right to life, lacks an autonomous existence and is limited in scope. For example, it is argued, it cannot be claimed except when its parent rights are jeopardised due to a lack of an adequate quantity or quality of water.[27] That is meant to imply that the right to water is a derivative or ancillary right, available only in the context of the other more explicit rights of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In this sense, the right to water is an auxiliary entitlement that is subservient to other explicitly-protected guarantees, and is dependent on the main right in the interest of which the right to water is protected.[28] It thus lacks an independent or free-standing status, and its realisation *per se* cannot be demanded by right holders.

In terms of this argument, the right to drinking water and water for sanitation remains in the 'shadows' of such rights as the right to health

25 See 'Statement from seminar on Social, Economic and Cultural Rights in the African Charter' adopted in Pretoria, 13-17 September 2004 (2005) 5 *African Human Rights Law Journal* (182 186 para 7.

26 A Cahill '"The human right to water – A right of unique status": The legal status and normative content of the right to water' (2005) 9 *International Journal of Human Rights* 389 394.

27 As above.

28 A Cahill 'Protecting rights in the face of scarcity: The right to water' in M Gibney & S Skogly (eds) *Universal human rights and extraterritorial obligations* (2010) 194.

and the right to dignity.[29] Claims to water should thus be 'enveloped' therewith and claimed as such. Because the human right to water is protected through other rights, the human right to water is a derivative or subordinate right, the violation of which can only be complained of when the parent rights are violated. In this sense, the relationship between the human right to water and its source (parent right) is such that the former is a small subset of the latter.[30] Its violation thus arises only when the parent right is violated in situations that involve the victims' access to adequate quantity and quality of water. Consequently, the right to water can only be guaranteed to the extent of its utility to and overlapping with the source from which it springs.

The implications of the human right to water for the duty of states are equally problematic: The obligations it creates vary depending on whether the right is subsumed under other human rights or is recognised as a stand-alone right.[31] As Cahill observed, in this sense, 'surely only certain aspects of the right to water will be protected and implemented'.[32]

This leaves the status of the right on shaky ground where it is neither fully recognised nor fully excluded from the ambit of the protection of the African Charter's guarantees. Unlike its jurisprudence on the right to housing and the right to food in which it unambiguously affirmed the existence of free-standing rights, the African Commission left the normative status of the right to water in doubt.

Needless to state, the parent rights can be protected or violated without necessarily involving violations of the right to water. Conversely, the right to water can also be realised or violated independently of its parent rights. For instance, a state's provision of water may fall below the amount or quality needed to realise right holders' basic access to drinking and sanitation water (minimum core of the right[33]), thereby violating the human right to water, although the impact of such a scenario on the right to dignity, health or food of the right holders might not be visible in the short term.

Moreover, under the existing approach, the scope of the right to water varies depending on which right it is assumed to be part of, and its legal basis remains diffuse. This obscures the normative content of the right and bedevils its standardisation and progressive development

29 TS Bulto 'The emergence of the human right to water in international human rights law: Invention or discovery?' (2011) 2 *Melbourne Journal of International Law* (forthcoming).

30 As above.

31 See A Hardberger 'Whose job is it anyway?:Governmental obligations created by the human right to water' (2006) 41 *Texas International Law Journal* 533 535.

32 Cahill (n 26 above) 394.

33 For an analysis of the minimum core of the human right to water, see section 4 below.

as an independent entitlement. Therefore, this approach to the human right to water gives a truncated and abbreviated picture of the right.

The African Commission, as a rule, has been less hesitant to read latent rights into the more explicit guarantees of the African Charter. The Commission has explicitly stated that it would consistently follow its own jurisprudence in its approach to the interpretation and application of Charter-based rights.[34] However, the Commission has strayed from its jurisprudence in the explication of the human right to water. Its case law on the right to water is in stark contrast to its usually purposive interpretation of the Charter that enabled the discovery of latent rights. In its decision in the *SERAC* case, the Commission took a very innovative approach by reading in fundamental rights and freedoms that were not explicit in the Charter.[35] Following a teleological approach to the interpretation of the provisions of the regional treaty, the Commission read in and inferred the rights to food and housing from other more explicit rights of the African Charter. The Commission stated:[36]

> The communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (art 4), the right to health (art 16) and the right to economic, social and cultural development (art 22). By its violation of these rights, the Nigerian government trampled upon not only the explicitly-protected rights but also upon the right to food implicitly guaranteed.

In the same vein, the African Commission ruled that the human right to housing, which is one of those rights that are not explicit in African human rights treaties, is implicit in other rights that are more explicitly guaranteed. It acknowledged the lack of an explicit guarantee for the right to shelter in the African Charter, but read in the same from related guarantees in the regional treaty. It ruled:[37]

> Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian government has apparently violated.

In effect, the African Commission has shown a willingness to explicate some of the implicit human rights from other explicitly-recognised guarantees. An analysis of the somewhat limited jurisprudence of

34 See n 63 below and accompanying text.

35 D Shelton 'Decision regarding Communication 155/96 (*Social and Economic Rights Action Centre/Centre for Economic and Social Rights v Nigeria*)' (2002) 96 *American Journal of International Law* 937 941.

36 *SERAC* case (n 20 above) paras 64-65.

37 *SERAC* case (n 20 above) para 60.

the Commission has shown that socio-economic rights that are not explicitly recognised in the African Charter should be regarded as implicitly included. Commenting on the emerging jurisprudence of the Commission, authors have concluded that 'where content falls short of international standards, the Commission is ... interpreting the provisions of the Charter in ways that generally conform to such standards'.[38]

However, having been presented with numerous opportunities to elaborate the normative basis and content of the human right to water, the African Commission consistently side-stepped the question. Considered against the backdrop of the emerging trend of the African Commission's case law in which the Commission read implicit rights into those which are explicitly guaranteed, it would have been expected that the Commission would follow the same route in future cases and declare the existence of a free-standing human right to water under the African Charter.

This is a sensible approach on many scores. First, it serves the purpose and object of the African Charter, in which member states undertook the 'duty to promote and protect human and peoples' rights and freedoms'.[39] Secondly, it is also in line with the African Commission's duty 'to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation'.[40] Third, in discovering and explicating what is only a latent right of the Charter, the Commission would only affirm what numerous African states have already accepted elsewhere at the international level.[41] For instance, in the Abuja Declaration, which was adopted by 45 African and 12 South American states at the First Africa-South America Summit in 2006, states undertook to 'promote the right of our citizens to have access to clean and safe water and sanitation within our respective jurisdictions'.[42] This trend was repeated at the global level, particularly when a resolution unambiguously recognising the human right to water was put to the vote of the states at the UN General Assembly.[43] This resolution was passed with 122 votes in favour, including the votes of at least 32 African states.

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38 Heyns (n 6 above) 69; GJ Naldi 'Limitation of rights under the African Charter on Human and Peoples' Rights: The contribution of the African Commission on Human and Peoples' Rights' (2001) 17 *South African Journal on Human Rights* 109 117.

39 Preamble, para 11 African Charter.

40 Art 45(1)(b) African Charter.

41 See Bulto (n 29 above).

42 Abuja Declaration adopted at First Africa-South America Summit, 26-30 November 2006 (Abuja, Nigeria) para 18 http://www2.mre.gov.br/deaf/asa/declaration%20of%20the%20first%20-%20(english).pdf (accessed 23 June 2011).

43 See General Assembly Adopts Resolution Recognising Access to Clean Water, Sanitation 64th General Assembly Plenary 108th Meeting (AM)) (General Assembly GA/10967) 28 July 2010.

Granted, the African Commission would not create a totally new right or obligation that states have not undertaken or envisaged. As noted above, elements of the human right to water have already been provided for at the African level in the African Children's Charter, the African Women's Protocol and the Nature Convention. Finally, some member states of the African Charter have already enshrined the right to water in their domestic legislation[44] or recognised one through judicial decisions.[45] The African Commission, in addition to Charter-based grounds, may rely on African domestic legislative and judicial practices recognising the right to water as inspirational sources to ground the right in the African Charter. While article 45 of the Charter normally envisages a situation where the Commission's case law inspires domestic legal principles and judicial practices, there is nothing in the African Charter that prevents the opposite scenario, in which the Commission borrows from domestic laws and judicial practices. After all, the monitoring and promotional mandate of the Commission is designed to enable the Commission to obtain the whole picture of the human rights situation on the continent and then 'distill the wisdom of that collective experience into advice which is made available to all interested parties'.[46] In this sense, the rights and freedoms enshrined in the Charter are in constant dialogue with domestic legal systems and practices, influencing and at the same time being influenced by positive legislative and judicial developments at the domestic level in member states. This is not confined to the practice of the Commission or Africa as (quasi-)judicial bodies elsewhere have long followed this approach.[47]

2.3 Other regional treaties: African Nature Convention

Africa is at the forefront of adopting binding treaties (albeit not human rights norms *per se*) that provide for direct and indirect legal grounds for the normative development, protection and promotion of the human right to water. Predating the adoption of any of the African human rights treaties, the African Nature Convention was described 1985 as 'the most comprehensive multilateral treaty for the conservation of

44 For a South African example, see A Kok & M Langford 'The right to water' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 191 197-198.

45 This has been the case in South Africa and Botswana. See *Lindiwe Mazibuko & Others v City of Johannesburg & Others* Case CCT 39/09 [2009] ZACC 28; See also *Matsipane Mosetlhanyane & Others v The Attorney-General of Botswana* Court of Appeal, CALB-074-10 (unreported).

46 African Commission on Human and Peoples' Rights Information Sheet 4 http://www.achpr.org/ACHPR_inf._sheet_No.4.doc (accessed 30 August 2011).

47 See generally A Roberts 'Comparative international law? The role of national courts in creating and enforcing international law' (2011) 60 *International and Comparative Law Quarterly* 57.

nature yet negotiated'.[48] Its adoption was necessitated, among other things, by the level of environmental disasters on the continent, such as droughts, desertification and the deterioration of water resources.[49] In terms of the impact of the Nature Convention on legislative reforms, as early as two decades ago studies have revealed that the Nature Convention 'has stimulated useful conservation measures in some countries and remains the framework on which a substantial body of legislation is based'.[50]

The Nature Convention contains substantive provisions that are pertinent to the promotion and protection of the human right to water. Under article II (Fundamental Principle), state parties undertake 'to adopt the measures necessary to ensure conservation, utilisation and development of soil, water ... in accordance with scientific principles and with due regard to the best interests of the people'. The Nature Convention enunciates both quantity and quality components of water provisions. The most pertinent provision, however, is found under article V(1).[51] It relates to the provision of water quantity, and stipulates:[52]

> The contracting states shall establish policies for conservation, utilisation and development of underground and surface water, and *shall endeavour to guarantee for their populations a sufficient and continuous supply of suitable water.*

On the other hand, article V(1)(d) addresses the issue of water quality, and provides for the duty of 'prevention and control of water pollution'. Although the provisions are stated in the language of state duties (as opposed to subjective rights), these duties are meant to accrue to human beneficiaries and, by implication, may be claimed by individuals and groups. The cumulative reading of article II and article V of the Nature Convention leads to the conclusion that state parties are obliged to provide a sufficient and continuous supply of unpolluted water to their populations (hence individuals and groups in those states are entitled to claim this). The African Commission can also ground its analysis and interpretation of the human right to water on this Convention. Under article 61, the Commission 'shall also take into

48 S Lyster *International wildlife law: An analysis of international treaties concerned with the conservation of wildlife* (1985) 115. See also M Prieur 'Protection of the environment' in M Bedjaoui (ed) *International law: Achievemnts and prospects* (1991) 1017 1035.

49 M van der Linde 'A review of the African Convention on Nature and Natural Resources' (2002) 2 *African Human Rights Law Journal* 33 35.

50 Lyster (n 48 above) 115. A study revealed that no less than 30 constitutions of the then 54 states of the continent enshrine the right to environment, and it is within the framework of this right that the human right to water is usually mentioned in Africa. See C Heyns & W Kaguongo 'Constitutional human rights law in Africa' (2006) 22 *South African Journal on Human Rights* 673 707.

51 See D Hu *Water rights: An international and comparative study* (2006) 97.

52 Art V(1) (my emphasis).

consideration ... general or special international conventions, laying down rules expressly recognised by member states of the Organisation of African Unity [now the AU]'. Conversely, the member states of the African Charter have affirmed from the outset 'their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and *other instruments adopted by the Organisation of African Unity* [now AU]'.[53]

The Nature Convention was revised[54] in order to bring it in line with the principles and guidelines developed at various conferences, including the Rio Declaration.[55] In its Preamble,[56] it clearly states that the revised Nature Convention was adopted so as to respond to the 'need to continue furthering the principles of the Stockholm Declaration, to contribute to the implementation of the Rio Declaration and of Agenda 21, and to work closely together towards the implementation of global and regional instruments supporting their goals'.[57]

As discussed below, individuals' and groups' right to a 'sufficient' and 'continuous' supply of 'suitable' water, provided for under article V(1) of the Nature Convention, or states' duties to ensure the same, correspond to the minimum core of the human right to water. Arguably, therefore, the Nature Convention enshrines a concrete and firm normative source for states' duty to ensure the enjoyment of the human right to water in Africa. The African Commission could avail itself of the provisions of the Nature Convention in its determination and/or elaboration of cases related to the human right to water.[58]

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53 See Preamble, para 10 African Charter (my emphasis).

54 African Convention on the Conservation of Nature and Natural Resources (revised Nature Convention), adopted in Maputo, Mozambique, on 11 July 2003. It enters into force 30 days after the deposit of the 15th instrument of ratification in accordance with its art 38. As at 12 January 2008, the Convention has been ratified or acceded to by eight states and will need a further seven more to come into operation. See Status of Ratifications http://www.africa-union.org/root/au/Documents/Treaties/List/Revised%20Convention%20on%20Nature%20and%20Natural%20Resources.pdf (accessed 23 May 2011).

55 As regards the human right to water, the content of relevant provisions remain intact in the revised Nature Convention. For a detailed discussion of the revised version of the Convention and changes introduced thereby, see Van der Linde (n 49 above) 49-56.

56 See para 12. For an analysis of the vital contribution of the Rio and Stockholm Declarations and of Agenda 21, see Bulto (n 29 above).

57 As Van der Linde commented, the substantive provisions of the 1968 Nature Convention are not exactly in line with the Rio instruments and other contemporary multilateral treaties and subsequent developments on the subject. See Van der Linde (n 49 above) 43.

58 See n 54 above and accompanying text.

3 Use of extraneous rules and the relevance of developments at the universal level

A special feature of the African Charter is the wide array of sources from which the African Commission may draw inspiration in its promotional and protective mandates.[59] The promotional mandate of the Commission includes setting standards and formulating principles related to human and people's rights entrusted to it under article 45 of the African Charter. The African Commission[60]

> shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialised agencies of the United Nations of which the parties to the present Charter are members.

The use of the phrase 'shall draw inspiration' implies that the Commission is enjoined to have recourse to international law, principles, jurisprudence and precedents of the universal and regional human rights systems and mechanisms.

The interpretive latitude provided by article 60 of the African Charter is of crucial relevance in constructing ambiguities involving such cases as the human right to water which clearly falls within the visions of the Charter, but lacks explicit protection. The Charter sought to instruct and empower the Commission to give due consideration to the wisdom, experience and emerging jurisprudence of the other regional systems and UN bodies to enrich its own promotional and protective roles. It has been remarked that article 60 of the Charter bears testimony to the fact that the Charter's provisions were inspired by universal human rights norms embedded in the UN Charter, the Universal Declaration of Human Rights (Universal Declaration) and other global human rights instruments.[61] The African Commission has stated its compliance with this provision:[62]

> In interpreting the African Charter, the African Commission relies on its own jurisprudence, and as provided by articles 60 and 61 of the African Charter, on appropriate and relevant international and regional human rights instruments, principles and standards.

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59 Under art 30 of the African Charter, the African Commission is entrusted with the duty 'to promote human and peoples' rights and ensure their protection in Africa'.

60 Art 60 African Charter.

61 GW Mugwanya *Human rights in Africa: Enhancing human rights through the African regional human rights system* (2003) 190.

62 *Institute for Human Rights and Development in Africa v Angola* (n 24 above) para 78.

Developments in the area of human and peoples' rights in other regional human rights systems, as well as within the UN system of human rights, have thus influenced the interpretation and application of the regional Charter.

Accordingly, global and regional developments in the area of human and peoples' rights will continue to have an effect on the African regional human rights jurisprudence.[63] Indeed, the African Commission has used the provisions of article 60 very liberally in order to bring the Charter in line with international practices.[64] More specifically, the African Commission has repeatedly referred to the General Comments of the United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee) in the interpretation of some of the controversial provisions of the African Charter. In the *SERAC* case, the Commission clearly stated that it sought to draw inspiration from General Comment 7 of the ESCR Committee on the definition of forced evictions, the meaning of which was lacking under the African Charter.[65] Likewise, the Commission relied on General Comment 4 of the ESCR Committee for an analysis of the right to adequate housing.[66]

This approach would certainly prove helpful as regards the clarification of the legal basis of the human right to water under the African Charter. In this context, General Comment 15 of the ESCR Committee is currently the single most pertinent, most comprehensive, most elaborate and firmly persuasive source of inspiration for the determination of issues relating to the legal basis, implementation and redressing violations of the human right to water in the African human rights system. General Comment 15 of the ESCR Committee employed three overlapping approaches to the discovery of the latent human right to water.

3.1 General Comment 15 and teleological interpretation

Teleological – also called purposive – interpretation is used, *inter alia*, to promote the objectives for which the rule of law was designed and to fill gaps in a given legal order.[67] The ESCR Committee's approach

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63 It has been rightly asserted that the African Commission would use only those practices and precedents which are in line with the letter and the spirit of the African Charter, and the duty to draw inspiration from non-African legal sources does not necessarily imply, perhaps obviously, a wholesale grafting of the latter in the interpretation of the Charter. However, when the Charter is silent on certain aspects or all of a right, the Commission would borrow the principles applied at the level of other regional human rights jurisdictions and the UN bodies. See Odinkalu (n 3 above) 327 352-354.

64 See Heyns (n 6 above) 688-689; F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 567-568.

65 *SERAC* case (n 20 above) para 63.

66 As above.

67 HG Schermers & DF Waelbroeck *Judicial protection in the European Union* (2001) 21.

in its General Comment 15 serves these two purposes. By defining the right holders' entitlements and duty bearers' obligations in the realisation of the human right to water, it expanded and promoted the human rights guaranteed under ICESCR.[68] More importantly, by explicating the latent content of ICESCR in relation to the human right to water, it attempted to fill the gap in its protective regime relating to the human right to water that had been missing from the explicit terms of ICESCR.

The ESCR Committee carved out a free-standing right to water from, *inter alia,* the provisions of article 11 (the right to an adequate standard of living) of ICESCR. Article 11(1) provides:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The ESCR Committee put special emphasis on the use of the word 'including' in the phrase 'including adequate food, clothing and housing'. Undeterred by the lack of any mention of the right to water in the list, the ESCR Committee viewed the manner in which the word 'including' is put in front of the list (food, clothing and housing) as indicative of the fact that the catalogue of rights guaranteed under article 11(1) of ICESCR is not exhaustive.[69] Since article 11 seeks to guarantee the right to an adequate standard of living to right holders, the prerequisites of which comprise food, housing and clothing, the inclusion of the right to water in the list is in consonance with the object and purpose of article 11(1). The right to water is as crucial – or, arguably, even more so – as the more explicitly-guaranteed elements of the right to an adequate standard of living listed under article 11(1).

The approach of the ESCR Committee has therefore taken care not to overstretch the ambit of article 11, as it only added a similarly essential component of the rights guaranteed under the provision. The ESCR Committee stated that '[t]he right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions of survival'.[70]

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68 International Covenant on Economic Social and Cultural Rights, adopted 16 December 1966; entered into force 3 January 1976.

69 See ESCR Committee, General Comment 15: Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights adopted 11-29 November 2002 para 3.

70 As above.

3.2 Derivative approach to the right

In addition to the teleological approach to interpretation which it applied to article 11 of ICESCR, the ESCR Committee also derived the human right to water from the other explicitly-guaranteed rights. In General Comment 15, it made use of article 12 of ICESCR, which guarantees the right to the enjoyment of the highest attainable standard of physical and mental health. Article 12(1) stipulates: 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'

The ESCR Committee has taken into account the inextricable relationship of the human right to water with other more explicit rights of ICESCR which, for their realisation, depend on the concomitant fulfilment of the right to water. The ESCR Committee stated that the human right to water should be seen in conjunction with other guarantees of ICESCR under article 12(1), namely, the right to the highest attainable standard of health, the rights to adequate housing and adequate food, and 'other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity'.[71]

As outlined above, the approach of carving out the human right to water – repeatedly used by the African Commission – is problematic in the establishment of a free-standing right to water. Used alongside the teleological approach of the ESCR Committee, which leads to an independent human right to water, however, the derivative approach to the human right to water offers more benefits than harm for the normative development of the right. Locating the right to water in related rights that have been accorded explicit recognition in international human rights treaties, it provides another legal basis to argue for the protection of the right to water. It also helps to emphasise the utility of the indivisibility, interdependence and interrelatedness of human rights that is embraced by the African Charter[72] and later proclaimed in the Vienna Declaration and Programme of Action.[73]

3.3 Recognition through state practice

Besides the teleological and derivative approaches to the discovery of the human right to water, the ESCR Committee also relied on and made reference to its own 'consistent' practice that has addressed the

71 As above.

72 Bulto (n 3 above) 157-158.

73 It was declared as follows: 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.' See Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 (A/CONF 157/23) para 5.

right to water in the course of consideration of state parties' reports.[74] Long before the adoption of General Comment 15, the ESCR Committee had criticised countries for the various shortcomings in their national implementation of the human right to water. It raised the issue of domestic implementation of the right with state parties in the context of examination of state reports. According to Riedel, the ESCR Committee addressed the human right to water in 33 of 114 concluding observations it adopted between 1993 and the adoption of General Comment 15 in 2002.[75] For instance, the ESCR Committee expressed its dismay regarding the violations of the right in Cameroon in its 1995 concluding observations, where it stated:[76]

> The Committee regrets the lack of access to potable water for large sectors of society, especially in rural areas where only 27 per cent of the population have access to safe water (within reasonable reach), while 47 per cent of the urban population have such access ... The Committee calls upon the state party to make safe drinking water accessible to the entire population.

The ESCR Committee on another occasion raised the problem of water pollution that had a negative impact on the related rights of health and food in the Russian Federation.[77] In its 1998 concluding observations on the state report of Israel, the ESCR Committee stated:[78]

> Excessive emphasis upon the state as a 'Jewish state' encourages discrimination and accords a second-class status to its non-Jewish citizens. This discriminatory attitude is apparent in the lower standard of living of Israeli Arabs as a result, *inter alia*, of lack of access to housing, water ... while the government annually diverts millions of cubic meters of water from the West Bank's Eastern Aquifer Basin, the annual *per capita* consumption allocation for Palestinians is only 125 cubic meters *per capita* while settlers are allocated 1 000 cubic meters *per capita* ...That a significant proportion of Palestinian Arab citizens of Israel continue to live in unrecognised villages without access to water, electricity, sanitation and roads ... Bedouin Palestinians settled in Israel ... have no access to water, electricity and sanitation.

In spite of the fact that the human right to water is not an explicit component of ICESCR, none of the state parties that were criticised by the ESCR Committee for violating the right has denied that the right inheres in the provisions of ICESCR.[79] It is clear that the ESCR Committee has taken the silence on the part of ICESCR state parties in the face

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74 As above.

75 E Riedel 'The human right to water and General Comment No 15 of the CESCR' in Riedel & Rothen (n 10 above) 19 25.

76 ESCR Committee Conclusions and Recommendations: Cameroon, UN Doc E/C 12/1/Add 40 (1999) paras 22 & 40.

77 ESCR Committee Conclusions and Recommendations: Russian Federation, UNDoc E/C 12/1/Add 13 (1999) para 25. See also para 38.

78 CESCR Conclusions and Recommendations: Israel, UN Doc E/C 12/1/Add 27 (1999) paras 10, 24, 26 & 28.

79 M Langford & JA King 'Committee on Economic, Social and Cultural Rights' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 477 509-514.

of its criticisms of their domestic implementation (or violation) of the human right to water as indicative of tacit assent by the states to the fact that ICESCR contains the human right to water, and consequent state obligations.

However, the reporting procedure is a non-adversarial process which is heavily reliant on 'constructive dialogue' between the reporting state and the monitoring body.[80] The concluding observations of the ESCR Committee might not be too intrusive, meaning that states might listen to the ESCR Committee without the need to confront it with arguments about their domestic obligations relating to the human right to water.[81] The argument that states' silence in the face of the ESCR Committee's concluding observations that is critical of the degree of their domestic enforcement of the human right to water as a source of binding state practice may be too slender a reef to lean against. On its own, it might prove too weak an indicator of states' acceptance of the human right to water, especially given the fact that such 'state acquiescence' in this context is not a result of an adversarial and evidence-based process where a real case is litigated at the international level.[82]

Put differently, the conclusion of the ESCR Committee that its own consistent practice in its dialogue with ICESCR member states is strong enough to give rise to state practice is questionable.[83] However, through the use of the three approaches (analytical devices) – teleological interpretation, derivative approach to the right and the acquiescence of states in the reporting procedure – the ESCR Committee has established a firm legal basis for the human right to water. The combined effect of the three approaches leads to the conclusion that there is a strong normative basis for the human right to water and attendant state obligations in ICESCR.

As demonstrated in section 2, above, the African Commission has already resorted to the approach of carving out the right to water from more explicit rights. As important as this approach might be, it will continue to have serious degrading implications for the status of the emerging human right to water. The cross-reference provisions of articles 60 and 61 of the African Charter mean that the African Commission should draw inspiration from the teleological approach of General

80 TS Bulto 'Beyond the promises: Resuscitating the state reporting procedure under the African Charter on Human and Peoples' Rights' (2006) 12 *Buffalo Human Rights Law Review* 57.

81 Generally, the 'main teeth [of the reporting procedure] – the mobilisation of shame – have been too weak a threat to ensure compliance'; see Bulto (n 3 above) 151-152.

82 Until and unless the Optional Protocol to ICESCR comes into force, which provides for a complaints procedure, the ESCR Committee's main tool of supervision will continue to be entirely dependent upon the non-adversarial state reporting procedure. See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution A/RES/63/117 on 10 December 2008 (not yet in force).

83 See Bulto (n 29 above).

Comment 15 of the ESCR Committee, which enables the establishment of an independent human right to water. The Commission may also draw inspiration from the approach of the ESCR Committee in the course of examination of state reports where the ESCR Committee discussed the situation of the human right to water at the domestic level. This approach, if used consistently, might lead to state acquiescence and consequently to an enhanced recognition of the right. After all, this would reinforce the emerging recognition by African states of the human right to water, especially in relation to the 45 African states that have adopted the Abuja Declaration.[84] Besides, 32 African states affirmed the existence of an independent human right to water through their vote in favour of the UN Resolution recognising the right,[85] none voting against it, six African states abstaining and 14 others absent at the voting.[86]

4 Normative content of the human right to water

While the preceding analysis led to the conclusion that there is a potential to locate a free-standing right in the African Charter and other regional instruments, it does not answer the question as to the concrete claims that would accrue from the free-standing right to the right holders. The African Commission has yet to elaborate the normative content of the right to water. However, the ESCR Committee has elaborated, in its General Comment 15, the entitlement that the human right to water entails. As demonstrated in section 3 above, General Comment 15 of the ESCR Committee is potentially a vital inspirational source for the interpretation and explication of the human right to water under the African Charter. It is thus instructive to examine General Comment 15 of the ESCR Committee as a potentially crucial inspirational source – which might even serve as a template – for the African Commission's approach to the discovery and elaboration of the human right to water under the African Charter.

Needless to state, water is the life blood of every living being. It is used for drinking, cooking, bathing, washing, waste disposal, irrigation (food production), industry, power production, transportation,

84 See Abuja Declaration (n 42 above).

85 See UN General Assembly Resolution (n 43 above).

86 This occurred in the framework of the UN General Assembly Resolution that recognised water as a human right and which was passed with a positive vote of 122 states, while it saw as many as 41 states abstaining, in the belief that they did not owe a legal obligation to ensure the right towards their residents. See General Assembly Adopts Resolution Recognising Access to Clean Water, Sanitation (n 43 above).

recreation and in cultural and religious practices.[87] Without it, life is virtually impossible. In terms of uses to which water is put, agriculture (food production) accounts for 65 per cent, industries for 25 per cent of global water use, while water deliveries to households, schools, businesses, and other municipal activities account for less than a tenth of global water use.[88] According to Riedel, 74 per cent of municipal water is used for bathroom consumption, 21 per cent for washing clothes and cleaning and only 5 per cent is used in the kitchen.[89] It is estimated that the absolute daily minimum *per capita* water need for human survival is two to five litres, depending on individual and climatic conditions.[90]

As a point of departure, formulating the human right to water as the right of every individual and group to an adequate amount and quality of water for all conceivable uses would be tantamount to promising what cannot be delivered. Put differently, the human right to water does not entitle individuals and groups to a limitless supply of water, but 'merely to the bare necessities of life, no more'.[91] The approach taken by General Comment 15 of the ESCR Committee is to identify selected types of uses and a minimum quality and quantity of water that should be immediately and continuously made available to satisfy the right holders' basic needs.[92] Understood as such, the General Comment's main aim is to interpret the human right to water as a guarantee to every right holder of a continuous supply of the bare minimum amount of water of adequate quality that an

87 In the Hindu and Buddhist traditions, the rivers of the earth, including the Indus, the Ganges and the Brahmaputra, originate from the mythical Mount Meru – the dwelling place of the gods – at the centre of the universe. In early Christian tradition, the waters of earth originate in the fountains of the Garden of Eden, which divide into the world's great streams such as the Nile, the Tigris, the Euphrates, the Indus and the Ganges. Similarly, in the Koran, every living thing is made from water and next to human kind it is the most precious creation. See PH Gleick 'An introduction to global fresh water issues' in PH Gleick (ed) *Water in crisis: A guide to the world's fresh water resources* (1993) 3; M Falkenmark, quoted in A Swain *Managing water conflict: Asia, Africa and the Middle East* (2004) 1.

88 S Postel *The last oasis: Facing water scarcity* (1992) 21-22.

89 Riedel (n 75 above) 19-20. See also AP Elhance *Hydropolitics in the Third World: Conflict and cooperation in international river basins* (1999) 8.

90 Riedel (n 75 above) 20.

91 Riedel (n 75 above) 26.

92 It is argued that such a minimalist approach, wherein the minimum core is explicated as an immediate guarantee as a starting point of the journey towards progressive and (eventually) full realisation of a given right, implies that maximum human rights gains can be achieved through temporarily minimising goals. Accordingly, Young argues that the minimum core approach 'trades rights-inflation for rights-ambition, channelling the attention of advocates towards the severest cases of material deprivation and treating these as violations by states towards their own citizens or even to those outside their territorial reach'. See KG Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale Journal of International Law* 113 114.

individual and group can reasonably expect and all states are obliged to supply.

The ESCR Committee in General Comment 15 identified minimum core entitlements in relation to the human right to water. The minimum core of the human right to water has been defined in terms of the *types* of uses involved, the adequacy of the *quantity* of water that a state should make available to the right holders and its *quality* while the right to *equality* of the right holders to have such an access to the selected uses must be ensured.

4.1 Types of use

As is the case with many of the other socio-economic rights guaranteed under ICESCR, the realisation of the human right to water depends on the availability of resources in the implementing state and does not necessarily entail the fullest and immediate implementation of all aspects of the right. However, as noted above, the implementation of the minimum core entails a state's obligation to realise that minimal entitlement immediately. Put differently, as regards the minimum core, individuals and groups are entitled to claim the immediate fulfilment of the identified minimum threshold of a right at issue.

The implication is that the selection of a minimum core of a given right must be made very carefully for it to be capable of immediate translation into reality by all states irrespective of their degree of access to resources (means at their disposal) and their level of development. In relation to the human right to water, this means that not all types of uses are part of the minimum core of the right. Only two types of uses qualify as a minimum core of the human right to water: personal and domestic.[93] The two types of uses comprise the use of water for drinking, washing, cooking, bathing, and other sanitation purposes.[94] In selecting these uses as the minimum core of the human right to water, the ESCR Committee has been mindful of the variety of essential uses to which water can be put but made a deliberate choice to single out the two uses as forming the minimum core of the

93 ESCR Committee General Comment 15 (n 69 above) paras 2, 6 & 12.

94 This is in line with other global and regional treaties as well as expert opinions. See Protocol on Shared Watercourse System in the Southern African Development Community (SADC) Region, adopted on 23 August 1995, entered into force on 29 September 1998; ILC 'Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined ground water' (1994) 2 *Yearbook of the International Law Commission* 89 110; ILA 'The Berlin (Revised Helsinki) Rules' International Law Association (adopted at the Berlin Conference) 2004 12. See also D Shelton 'Equity' in J Brunnee & EHD Bodansky (eds) *The Oxford handbook of international environmental law* (2007) 639 648-649; SC McCaffrey *The law of international watercourses* (2007) 371; P Beaumont 'The 1997 UN Convention on the law of non-navigational uses of international watercourses: Its strengths and weaknesses from a water management perspective and the need for new workable guidelines' (2000) 16 *Water Resources Development* 475 483-484.

right.[95] It thus excluded such uses of water as is necessary to produce food (right to adequate food), religious and cultural practices (the right to take part in cultural life) and environmental hygiene (right to health).

This approach has been chastised for being too restrictive in defining the human right to water as an entitlement merely to water required for personal and domestic uses.[96] Biswas, for instance, argues that the approach to the elaboration of the human right to water should have cast the net wider in a manner that includes within its ambit such entitlements as the right required for environmental needs, agriculture, energy production, industrial and regional development, conservation and tourism.[97]

Apparently this is a result of a misunderstanding of the ramifications of General Comment 15 of the ESCR Committee. The approach of General Comment 15 does not preclude the possibility of claiming the waters needed for other purposes in the context of the realisation of other closely-related rights. For instance, some amount of water could be claimed for the production of food as part of the right to food, or for cultural practices under the right to take part in cultural life. General Comment 15 has the main purpose of identifying that amount of a non-derogable bare minimum amount of water that should always sit at the heart of the human right to water *per se* and the related implementation duties of states. Accordingly, General Comment 15 stated:[98]

> Water is required for a range of different purposes, besides personal and domestic uses, to realise many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.

In effect, the water quantity and quality required for the purpose of realising claims other than the human right to water should be analysed in the context of those particular rights. The UN Special Rapporteur on the Right to Food, Jean Ziegler, for instance, has shown in at least two

95 See ESCR Committee General Comment 15 (n 69 above) para 6.

96 AK Biswas 'Water as a human right in the MENA region: Challenges and opportunities' (2007) 23 *International Journal of Water Resources Development* 209 219-221.

97 Biswas (n 96 above) 219-220.

98 ESCR Committee General Comment 15 (n 69 above) para 6.

of his reports[99] that the water needed for the realisation of the right to food should be analysed separately from the human right to water.[100]

The preferential treatment of water allocation for personal and domestic uses had already been enshrined in the 1997 Watercourses Convention.[101] Under article 10(2) the Watercourses Convention provides that, in the event of conflicts between different uses of water, the conflict 'shall be resolved with special regard being given to the requirements of vital human needs'. The International Law Commission (ILC), the UN body that was responsible for drafting and elaborating the provisions of the Watercourses Convention, explained that the 'vital human needs' proviso is designed to protect and prioritise water needed 'to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation'.[102] Similarly, the International Law Association (ILA), a highly influential body composed of experts in the field of international law, whose earlier works provided a model draft for and influenced the final content of the Watercourses Convention, also stated that 'the vital human needs' phrase under article 10(2) of the Watercourses Convention underscores the need to prioritise water uses for 'natural wants'.[103] It stressed:[104]

> Whatever one terms the preferred uses, they include water needed for immediate human consumption such as drinking, cooking and washing, and for other uses necessary for the immediate sustenance of a household, such as watering livestock for household use and keeping a kitchen garden. Any other use, including using water for commercial irrigation, in mining, in manufacturing, to generate power, or for recreation, is not included within the concept of "vital human needs'.

It also showed that the preferential treatment of water for vital human needs, otherwise referred to as personal and domestic uses, is in line

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99 'Preliminary Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food, Jean Ziegler' (United Nations General Assembly (A/56/210) 2001) paras 58-71; 'Report Submitted by the Special Rapporteur on the Right to Food, Jean Ziegler, in Accordance with Commission on Human Rights Resolution 2002/25' (United Nations Economic and Social Council (E/CN.4/2003/54,10 January 2003) 2003) paras 44-51.

100 On the necessity of treating the human right to water differently from the right to food, see NAF Popovic 'In pursuit of environmental human rights: commentary on the Draft Declaration of Principles on Human Rights and the Environment' (1996) *27 Columbia Human Rights Law Review* 487 526-527.

101 The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses; adopted 21 May 1997, not yet in force. See General Assembly Resolution 51/229, annex, Official Records of the General Assembly, 51st session, Supplement 49 (A/51/49).

102 ILC 'Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and commentaries thereto and resolution on transboundary confined ground water' (1994) 2 *Yearbook of the International Law Commission* 89 110.

103 ILA 'The Berlin (Revised Helsinki) Rules' International Law Association (adopted at the Berlin Conference) 2004 12.

104 As above.

with long-standing state practice. It stated that '[c]ourts and other legal institutions have long recognised a preference in municipal law for "domestic uses" of water relative to competing uses of water, or as the UN Convention, article 10(2), describes it, "vital human needs"'.[105] Thus, the priority attached to water required for personal and domestic use by the ESCR Committee in its General Comment 15 is neither novel nor objectionable. It has already been applied in international water-related conventions, accepted by expert bodies as well as the ILC and domestic tribunals.

4.2 Adequacy of water for these selected uses

The minimum core of the right to water required for personal and domestic uses involves access to a quantitative and qualitative minimum. According to the ESCR Committee,[106]

> [t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

The human right to water therefore implies an entitlement to water of adequate quantity and quality that would satisfy the personal and domestic uses of an individual and groups. According to the ESCR Committee, this can further be broken down into the availability, quality and accessibility aspects of the water resource.

4.2.1 Availability

According to the ESCR Committee, the minimum core of the human right to water comprises the availability of a sufficient and continuous supply of water for personal and domestic use.[107] The sufficiency of the available water is gauged in terms of each person's need for uses such as drinking, personal sanitation, the washing of clothes, food preparation and other personal uses. However, General Comment 15 of the ESCR Committee states that the 'quantity of water available for each person should correspond to the World Health Organisation (WHO) guidelines'.[108] General Comment 15, however, accommodates a differential treatment of individuals and groups that may need additional water due to health, climate and work conditions.[109] Apart from a soft

105 As above.

106 ESCR Committee General Comment 15 (n 69 above) para 2.

107 ESCR Committee General Comment 15 (n 69 above) para 12(a).

108 As above.

109 As above.

guideline, the ESCR Committee has found it unnecessary to lay down fixed *per capita* water availability.[110]

4.2.2 Quality

Stated in the negative, the quality of water must not pose a threat to a person's health. As such, it must be safe from micro-organisms, chemical substances and radiological hazards.[111] According to the ESCR Committee, the water should be of an acceptable colour, odour and taste for each personal and domestic use.[112] The requirement of colour, odour and taste may not be necessary for health purposes, but it has been considered to be consistent with the dignity of the individual beneficiary.[113]

4.2.3 Accessibility

The human right to water entitles everyone to the right to access water and water facilities and services without discrimination. According to the ESCR Committee, the accessibility of water and water facilities and services involves four dimensions.[114] *Physical accessibility* implies the right to have sufficient and clean water and water facilities 'within, or in the immediate vicinity of each household, educational institution and workplace'.[115] *Economic accessibility* ensures the affordability of clean and sufficient water delivery for all.[116] Affordability does not entitle individuals and groups to free water for personal and domestic uses but provides for the right to access the water at a price that everyone can afford. General Comment 15 does not rule out the possibility that the state be required to provide free water for those who could not afford to pay for water for personal and domestic uses. It is the obligation of states to fulfil the individuals' and groups' right to the minimum core of the right to water. According to the CESCR:[117]

> State parties are also obliged to fulfil (provide) the right when individuals or a group are unable, for reasons beyond their control, to realise that right themselves by the means at their disposal.

The accessibility of water should be in line with the requirements of the right to equality and discriminatory policies and practices are prohibited. This layer of the human right to water has wide-ranging benefits for rural communities, poorer sections of the society and

110 The ESCR Committee stated that '[t]he adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies'. See ESCR Committee General Comment 15 (n 69 above) para 11.

111 ESCR Committee General Comment 15 (n 69 above) para 12(b).

112 As above.

113 Kok & Langford (n 44 above) 191 199.

114 ESCR Committee General Comment 15 (n 69 above) para 12(c).

115 ESCR Committee General Comment 15 (n 69 above) para 12(c)(i).

116 ESCR Committee General Comment 15 (n 69 above) para 12(c)(ii).

117 ESCR Committee General Comment 15 (n 69 above) para 25.

communal and traditional groups. Access to water implies not only the availability of water resources as a physical object, but also individuals' and people's rights to information (information accessibility) related thereto: It incorporates 'the right to seek, receive, and impart information concerning water issues'.[118]

5 Conclusion

The human right to water has been a Cinderella of the African Charter's socio-economic rights guarantees. The ambiguity surrounding the legal basis and normative content of the right to water is in part characteristic of the remainder of all the socio-economic rights of the Charter, albeit aggravated in the case of the right to water by the absence of an explicit mention of the right in the regional instrument. Given the object and purpose of the African Charter, which include securing individuals' and groups' rights to the necessities of livelihood, the African Commission can appropriately read the right to water into other rights that are explicitly guaranteed in the African Charter (such as the right to life, dignity, health and a healthy environment) in a way that helps establish a free-standing entitlement which the beneficiaries can claim on its own. This is in line with regional jurisprudence, where the Commission allowed the 'reading-in' of implicit rights to food and shelter into other rights and freedoms of the African Charter. Further legal bases for the declaration of the human right to water come from other regional treaties, including the African Children's Charter, the African Women's Protocol and the Nature Convention. The African Commission's attempt hitherto to ground aspects of the human right to water solely in the *corpus* of the African Charter is too narrow an approach, given the more explicit additional legal guarantees of the right in related regional treaties.

What is more, the African Commission needs to revisit its stance on the right to water, and clearly state that the Charter does indeed protect the right, albeit in implicit terms. The Commission should return to its usual stance of reading in implicit rights in such a way that facilitates the rights' explication. In short, the human right to water in the African human rights system only needs a discovery instead of an invention. The analogous practice of the ESCR Committee where the right to water is not explicit in ICESR also suggests that the African Commission would be within its right to have recourse to such a purposive approach to treaty interpretation in order to bring out the latent content of the treaty. The sooner the Commission establishes the human right to water as an independent right, and defines its normative content, so much the better, as without it millions of Africans would face what Achebe referred to as 'a kind of slow and weary life which is worse than death'.

118 ESCR Committee General Comment 15 (n 69 above) para 12(c)(iv).

AFRICAN HUMAN RIGHTS LAW JOURNAL

The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive rights

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Summary

The article examines the activities of the African Commission with regard to the advancement of sexual and reproductive health and rights in Africa. The article reviews the importance of applying human rights to sexual and reproductive health issues. It further discusses the promotional and protective mandates of the African Commission with a view to ascertaining whether the Commission has given attention to addressing the sexual and reproductive health challenges facing the region. In this regard, the paper focuses on two important issues – maternal mortality and same-sex relationships. Based on careful analyses of the promotional and protective mandates of the Commission, it is argued that some efforts have been made towards advancing reproductive health and rights in Africa. However, much more effort is needed with regard to sexual health and rights, especially with regard to issues such as same-sex relationships, sex work and violence against women. In conclusion, some suggestions are provided on the role of the African Commission in advancing sexual and reproductive health and rights in the region.

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1 Introduction

In recent times, the conceptualisation of the nature and content of the right to health, including sexual and reproductive rights, has received the attention of the international human rights community. However, under the African human rights system, the African Commission on Human and Peoples' Rights (African Commission) has not yet articulated the nature and content of this right, including sexual and reproductive rights. Generally, the realisation of human rights, especially socio-economic rights, including the right to health, can indeed be challenging for countries with developing economies. This is particularly true for Africa where poverty is rife, and where conflicts and disease continue to threaten lives. It is now accepted that Africa carries the world's burden of sexual and reproductive ill-health. This is tellingly revealed in the devastating effects of HIV and AIDS, the high maternal mortality and morbidity rates, the high incidence of sexually-transmitted infections and unsafe abortions in the region.[1]

According to the Joint United Nations Programme on HIV/AIDS (UNAIDS), Africa accounts for about 23 million people out of the total number of 33 million people said to be living with HIV worldwide.[2] The epidemic tends to affect women more than men. It is estimated that 60 per cent of people living with HIV in Africa are women.[3] The prevalence of HIV in young women in Africa is nearly four times that of young men.[4] Although sub-Saharan Africa remains highly affected, Southern Africa is the epicentre. South Africa, with an estimated 6 million people living with HIV, is said to have the largest number of people living with HIV in the world.[5]

The lack of access to sexual and reproductive health services remains a great challenge for many Africans, while sexually-transmitted infections other than HIV, continue to threaten the lives and well-being of others in the region.[6] In other parts of Africa, such as Western Africa, a woman's lifetime risk of death from pregnancy is said to be one of the highest in the world. For example, in Chad the risk of a woman dying during pregnancy or childbirth is one in 14, which is higher than the average for the region.[7] Even in a relatively prosperous country like Nigeria, the maternal mortality rate is estimated at 840 deaths per 100 000 live births. Nigeria is said to have one of the highest mater-

1 See eg A Glasier *et al* 'Sexual and reproductive health: A matter of life and death' (2006) 368 *Lancet* 1595-1607.

2 UNAIDS *AIDS epidemic update* (2010) 7.

3 UNAIDS (n 2 above) 15.

4 As above.

5 UNAIDS (n 2 above) 28.

6 Glasier (n 1 above).

7 WHO, UNICEF, UNFPA and World Bank *Trends in maternal mortality: 1990 to 2008* (2010).

nal mortality ratios in the world.[8] The likelihood of a woman dying during pregnancy or childbirth in the country is put at one in 23 compared to one in 9 200 in Malta.[9] Also, the child mortality rate in the country remains one of the worst in the world and progress seems to be stagnant in this area.[10]

In many parts of Africa, issues relating to sexual health and sexuality are viewed with suspicion and remain controversial. Due to religious and cultural beliefs, any attempt at expressing homosexuality is condemned as unnatural and ungodly. People in same-sex relationships continue to be vilified and subjected to different forms of abuse and human rights violations, including the threat of death.[11] Increasingly, African countries adopt legislation criminalising same-sex relationships.[12] This has continued to fuel stigma and discrimination against homosexuals, thus raising human rights concerns.

Although the constitutions of most African countries do not explicitly recognise the right to health as a justiciable right,[13] most of these countries have ratified numerous international and regional human rights instruments guaranteeing the right to health. Some of these instruments include the International Covenant on Economic, Social and Cultural Rights (ICESCR);[14] the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);[15] the Convention on the Rights of the Child (CRC);[16] the African Charter on Human

8 n 7 above, 17.

9 n 7 above, 18.

10 Central Intelligence Agency (CIA) *The 2008 world facts book* https://www.cia.gov/library/publications/the-world-factbook/ (accessed 1 March 2011). The child mortality rate in the country is estimated at 94 deaths per 1 000 live births.

11 See D Smith 'South Africa gay rights activists warn of homophobic attacks after murder' *The Guardian* http://www.guardian.co.uk/world/2011/may/03/south-africa-homophobic-attacks (accessed 29 September 2011).

12 See eg Anti Homosexual Bill No 18 of 2009, Burundi government moves to criminalise homosexuality; ''Nigerian anti-gay bill causes protests' *Afrol News* http://www.afrol.com/ articles/24541 (accessed 26 September 2011).

13 See eg sec 6(6) of the Nigerian Constitution 1999, which provides that all rights, including the right to health, listed in ch 2 of the Constitution, shall not be made justiciable; see also sec 4 of the Amended Constitution of Lesotho, which listed the various human rights guaranteed but excluding the right to health; ch 3 of the Constitution of Zimbabwe, 2000, which guarantees various human rights excluding the right to health.

14 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3, entered into force on 3 January 1976.

15 Convention on the Elimination of All Forms of Discrimination Against Women GA Res 54/180 UN GAOR 34th session Supp 46 UN Doc A/34/46 1980.

16 Convention on the Rights of the Child, adopted in 1989, UN Doc A/44/49 (entered into force 2 September 1990).

and Peoples' Rights (African Charter);[17] the African Charter on the Rights and Welfare of the Child (African Children's Charter);[18] and the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol).[19] While it is recognised that African countries are attempting, through the formulation of laws and policies, to address some of these challenges, the question remains as to whether these steps are in line with the obligations imposed on these countries under international human rights law. The application of human rights principles and standards to sexual and reproductive health issues, such as maternal mortality and same-sex relationships, is important in that it helps to hold governments accountable to the obligations to respect, protect and fulfil human rights relating to these issues. Regional human rights bodies or tribunals such as the African Commission can play important roles in advancing sexual and reproductive health and rights in the region. The African Commission can hold governments accountable to their obligations under regional and international human rights instruments with regard to the right to health, including sexual and reproductive rights. Particularly, the Commission can set standards and create precedents with regard to the nature of states' obligations to promote and protect human rights in the context of maternal mortality and same-sex relationships.

Against this backdrop, the article examines the activities of the African Commission with regard to the advancement of sexual and reproductive health and rights in the region. The article discusses the importance of applying human rights to sexual and reproductive health issues. It further discusses the promotional and protective mandates of the Commission, with a view to ascertaining whether the Commission has paid attention to sexual and reproductive health and rights challenges facing the region. For this purpose, the article focuses on two important issues – maternal mortality and same-sex relationships. The article argues that, based on a careful analysis of the promotional and protective mandates of the Commission, it would seem that some efforts have been made towards advancing reproductive health and rights, including maternal mortality in the region. However, much effort is needed with regard to sexual health and rights, especially as regards issues such as same-sex relationships, sex work and violence against women. In conclusion, a few suggestions are provided on the role of the African Commission in advancing sexual and reproductive rights in the region.

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17 African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev 5, adopted by the Organisation of African Unity, 27 June 1981, entered into force 21 October 1986.

18 African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.0/49 (1990) entered into force 29 November 1999.

19 Adopted by the 2nd ordinary session of the African Union General Assembly in 2003 in Maputo, Mozambique, CAB/LEG/66.6 (2003) (entered into force 25 November 2005).

2 Application of human rights to sexual and reproductive health

Human rights principles and standards are generally contained in national constitutions and laws and regional and international human instruments. These principles and standards help give direction to government agencies, individuals and institutions on the appropriate shaping of policies and practices.[20] The question may then arise: Are human rights useful in the context of sexual and reproductive health? Put in another way, what are the benefits of applying human rights principles and standards to sexual and reproductive health issues such as maternal mortality and same-sex relationships? Indeed, a few commentators doubt the relevance of the human rights approach in addressing issues affecting women's rights.[21] Human rights can, however, become important tools to empower disadvantaged and marginalised groups in society such as women and people in same-sex relationships, to legitimately assert their interests. Moreover, human rights principles and standards can be useful tools for government agencies to employ with a view to advancing rights in the context of maternal mortality and same-sex relationships. For instance, reports showing that maternal deaths occur in many African countries due to poor medical attention, lack of emergency obstetrics care, hostile attitudes of health care providers, a systemic failure or corrupt practices on the part of health care providers, may indicate the failure on the part of a government to protect and promote a woman's rights to life, dignity, non-discrimination and to be free from inhuman or degrading treatment.[22]

Equally, in the context of same-sex relationships, the adoption of laws or policies criminalising consensual sexual acts between two adults will not only fuel discrimination against gays and lesbians, but will also result in human rights violations. As noted earlier, the criminalisation of same-sex relationships seems to be the norm in many African countries. Punitive laws against gays and lesbians violate their rights to privacy, non-discrimination and dignity guaranteed in the African Charter, and render people in same-sex relationships more susceptible to HIV infection. The South African Constitutional Court in *National Coalition of*

20 R Cook *et al Reproductive health and human rights: Integrating medicine, ethics and law* (2003) 148.

21 M Tushnet 'Rights: An essay in informal political theory' (1989) 17 *Politics and Society* 410; see also C Smart *Feminism and the power of law* (1989) 1-4; A McColgan *Women under the law: The false promise of human rights* (2000) 6.

22 See eg Centre for Reproductive Rights (CRR) *Failure to deliver: Violations of women's human rights in Kenyan facilities* (2007) 24; Centre for Reproductive Rights (CRR) *Broken promises: Human rights, accountability and maternal death in Nigeria* (2008); see also Amnesty International *Out of reach: The cost of maternal health in Sierra Leone* (2009); Human Rights Watch *Stop making excuses: Accountability for maternal health care in South Africa* (2011).

Gay and Lesbian Equality v The Minister of Justice explained that the criminalisation of consensual sexual acts between adults violates the rights to privacy and dignity.[23] Moreover, a failure on the part of a state to prevent acts of violence by non-state actors against gays and lesbians within its jurisdiction may result in a breach of the obligation to protect human rights.

It should be borne in mind that the application of human rights to contentious and emerging issues, such as sexual and reproductive health, may sometimes prove challenging. This is more so when one considers that sexual and reproductive health and rights are a subset of the right to health. Under international law, the right to health has often been criticised for being vague and insufficiently defined or ascertainable such that its enforceability is difficult.[24] This has led to a reluctance to recognise or enforce this right at the national level.

Given that issues relating to sexual and reproductive health and rights evoke emotions and sentiments in many African societies, the application of human rights standards to these issues may face great opposition. It will be recalled that the promotion and protection of rights relating to sexual and reproductive health received a lot of attention during the International Conference on Population and Development (ICPD) in Cairo in 1994,[25] and during the Fourth World Conference on Women in Beijing in 1995.[26] At these conferences, the international community affirmed that the promotion and protection of human rights relating to sexual and reproductive health are matters of social justice, which can be addressed through the application of human rights contained in existing national constitutions and regional and international human rights instruments.[27] These conferences provided an extensive definition of the notion of reproductive health as follows:[28]

> Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its function and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if and when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice of regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable

23 1999 1 SA 6 (CC); 1998 12 BCLR 1517 (CC).

24 DP Fidler *International law and infectious diseases* (1999).

25 Report of the International Conference on Population and Development (ICPD) 7, UN Doc A/CONF.171/13 (1994).

26 Fourth World Conference on Women Beijing (FWCW) held on 15 September 1995, A/CONF.177/20.

27 Cook *et al* (n 20 above).

28 See para 7(2) of ICPD (n 25 above) and para 94 of FWCW (n 26 above).

> women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive care is ... a constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted disease.

However, while these conferences recognised the need to address high maternal mortality rates in the world, especially in poor regions such as Africa, scant attention was given to sexual health and rights issues such as same-sex relationships. The conclusions reached at both the Cairo Programme of Action and the Beijing Declaration have subsequently been consolidated as the five-year reviews in 1999[29] and 2000[30] respectively.

A major criticism of the definition of reproductive health at Cairo and Beijing is that it tends to subsume sexual health under reproductive health and rights.[31] This in itself is a shortcoming considering that not all sexual activities lead to procreation. In essence, it may be argued that the deliberations at ICPD and Beijing gave more attention to reproductive health and rights than to sexual health and rights. This is hardly surprising, given that sexual rights when compared with reproductive health and rights are a more recent and evolving set of rights under international law. Indeed, Petchesky referred to this set of rights as the 'newest kid on the block'.[32]

While it is noted that the concepts of reproductive health and sexual health are interrelated;[33] they are to some extent distinct from each other.[34] The World Health Organisation (WHO) has made an attempt

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29 UN follow-up meeting of the ICPD held in New York from March and June 1999.

30 UN Five-Year Review of the Implementation of the Beijing Declaration and Platform for Action (Beijing + 5) held in the General Assembly, 5-9 June 2000.

31 See Report of Paul Hunt, Special Rapporteur, on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2004/49, 16 February, 2004.

32 R Petchesky 'Sexuality right: Inventing a concept, mapping international practice' unpublished paper presented at the Conference on Reconceiving Sexuality, Rio de Janeiro, 14-18 April, 1996.

33 For a detailed explanation of this, see R Dixon-Muller 'The sexuality connection in reproductive health' (1993) 24 *Studies in Family Planning* 277, where the author attempts to divide the elements of reproductive health care into two categories – sexual health and reproductive health – each with specific components.

34 For more discussion on this, see AM Miller 'Sexual but not reproductive: Exploring the junction and disjunction of sexual and reproductive rights' (2000) 4 *Health and Human Rights* 86-87. Here the author contends that a discussion on sexual health and rights goes beyond traditionally-conceived notions of reproduction and heterosexuality, and embraces diverse groups of people and issues, including homosexuals and heterosexuals and reproductive and non- reproductive sexual activities.

to clarify the content and nature of sexual health and rights.[35] According to the WHO, sexual rights embrace existing and recognised human rights at national, regional and international levels. These rights are incorporated into the domestic laws of many countries and implemented accordingly. The working definition of sexual rights includes the right of all persons, free of coercion, discrimination and violence, to[36]

- the highest attainable standard of sexual health, including access to sexual and reproductive health care services;
- seek, receive and impart information related to sexuality;
- sexuality education;
- respect for bodily integrity;
- choose their partner;
- decide to be sexually active or not;
- consensual sexual relations;
- consensual marriage;
- decide whether or not, and when, to have children; and
- pursue a satisfying, safe and pleasurable sexual life.

This definition is the most comprehensive and up-to-date. While it is difficult to accept a single definition of sexual health and rights because of diverse sexual desires and the historical background of the concept, nonetheless, human rights, including sexual and reproductive health rights, should be exercised inclusively without a restriction on the rights of anyone.

The recent introduction of the African Women's Protocol has further added to the human rights of sexual and reproductive health in the region. The Women's Protocol contains a number of radical and ground-breaking provisions recognising the sexual and reproductive rights of women. The Women's Protocol explicitly articulates all women's reproductive rights as human rights. It also expressly guarantees a woman's right to control her fertility without being coerced into making any wrong decision(s).[37] Article 14, entitled 'Health and Reproductive Health', provides:

> 1 States parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
>
> (a) the right to control their fertility;
>
> (b) the right to decide whether to have children, the number of children and the spacing of children;
>
> (c) the right to choose any method of contraception;
>
> (d) the right to self-protection and to be protected against sexually-transmitted infections, including HIV/AIDS;

35 World Health Organisation (WHO) *Defining sexual health, Report of a technical consultation on sexual health* (2006) 5.

36 As above.

37 Art 14 African Women's Protocol.

(e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually-transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
(g) the right to have family planning education.

2 States parties shall take all appropriate measures to:
(a) provide adequate, affordable and accessible health services, including information, education and communication programmes, to women, especially those in rural areas;
(b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
(c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

From the above provisions it is clear that the African Women's Protocol has contributed greatly to the development and recognition of the reproductive rights of women both internationally and nationally. It remains one of the most radical and progressive human rights instruments in the context of sexual and reproductive health and rights.[38] If implemented well, the Women's Protocol will go a long way in advancing the sexual and reproductive rights of African women.

However, one of the major criticisms of the African Women's Protocol is that it tends to give too much attention to reproductive health and rights compared to sexual health and rights. For instance, the Women's Protocol is surprisingly silent on the issue of same-sex relationships. The Protocol does not contain a specific provision recognising the right of women to exercise their sexual choices regardless of their sexual orientation. Moreover, the language of the Protocol does not explicitly confer on women the possibility of asserting their sexuality. Rather, women are viewed through a stereotypical lens of 'motherhood'.[39] It is hoped that in future, when the opportunity arises for either the African Commission or the African Court on Human and Peoples' Rights (African Court) to interpret the provisions of the African Women's Protocol, a generous and purposive approach will be adopted.

38 See F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72; see also Centre for Reproductive Rights (CRR) *Briefing paper: The Protocol on the Rights of Women in Africa: An instrument for advancing reproductive and sexual rights* (2005) 4-7.

39 See eg RS Mukasa *The African Women's Protocol: Harnessing a potential force for positive change* (2009) 5.

3 Promotional and protective mandate of the African Commission and sexual and reproductive rights

The African Commission was established under article 30 of the African Charter. By virtue of article 31, the Commission consists of 11 members, chosen from among African personalities of the highest reputation, and known for their morality, integrity and competence in matters of human and peoples' rights. Members of the Commission are to be elected by the General Assembly of the African Union (AU) and not more than one person should be elected per country. The tenure of members of the Commission is six years. However, members may be eligible for re-election. The mandate of the African Commission can broadly be classified into two – promotional and protective.

The promotional mandate of the African Commission is contained in article 45 of the African Charter; the protective mandate in articles 47 to 55. While articles 47 to 52 relate to communications filed by states to the Commission, articles 54 and 55 relate to communications filed by non-state parties.

The discussions that follow relate to how the promotional and protective mandate of the African Commission intersects with the realisation of sexual and reproductive rights, especially in relation to maternal mortality and same-sex relationships in the region. The authors do not intend to cover all the promotional activities of the Commission. Rather, the focus is on resolutions issued by the Commission and the activities of the Special Rapporteur on Women that may have implications for the enjoyment of sexual and reproductive rights in Africa.

3.1 Promotional mandate of the African Commission and sexual and reproductive rights

The promotional mandate of the African Commission is spelt out in article 45(1) of the African Charter as follows:

(a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to governments;
(b) to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation;
(c) to co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

Since the establishment of the African Commission, its decisions, recommendations and resolutions have challenged African leaders to make good use of their offices, and to respect citizens' rights uniformly.[40] Over the years the decisions, recommendations and resolutions of the Commission have influenced governments, non-governmental organisations (NGOs) and human rights advocates all over the continent. The collaboration between NGOs and the Commission has been critical to the success of the Commission and its efforts to protect and promote human rights, particularly sexual and reproductive rights. This symbiotic relationship has contributed in no small way to the progress made by the Commission towards the promotion of sexual and reproductive rights in Africa. The Commission was able to tap into the expertise of NGOs and other human rights institutions[41] to draft some of its resolutions relating to sexual and reproductive rights.

In terms of the African Charter, the African Commission is charged with (amongst other functions) promoting and protecting human and peoples' rights in Africa. The Commission embarks on promotional state visits during which it gathers information on human rights issues. The commissioners meet with government officials, NGOs and the general public during state visits and raise awareness on human rights issues and responses. The African Commission urges state parties to protect, promote, respect and fulfil human rights by implementing their human rights obligations.

As stated above, the promotional mandate of the African Commission is contained in article 45 of the African Charter. Although this provision does not specifically confer on the Commission the power to issue resolutions, a broad interpretation of article 45(a), particularly the phrase 'and should the case arise, give its views or make recommendations to governments', would seem to permit the Commission to issue important resolutions on human rights. Thus, realising the threats that the HIV/AIDS pandemic poses to millions of lives in Africa and the attendant human rights challenges raised by the pandemic, the Commission in 2002 issued a resolution calling on African governments to adopt a human rights-based approach to addressing the impact of HIV/AIDS in the region. According to the Commission, it is imperative that all efforts adopted by African governments towards curbing the spread of HIV must be respectful of individuals' human rights.[42]

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40 This was demonstrated in cases such as *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) discussed below.

41 The African Commission has continued to received technical support from organisations such as the African Centre for Democracy and Human Rights, the Institute for Human Rights Development in Africa and the Centre for Human Rights at the University of Pretoria.

42 Resolution on the HIV/AIDS Pandemic–Threat against Human Rights and Humanity adopted at the 29th ordinary session of the African Commission held in Tripoli, Libya, ACHPR Res.53/(XXIX)01.

Echoing the decision reached at Abuja,[43] the African Commission calls on African governments to allocate adequate resources to curb the spread of HIV/AIDS and to ensure the provision of care and support services for those in need. Also, the Commission calls on African governments to take concrete steps addressing stigma and discrimination associated with the pandemic, particularly with regard to HIV-positive persons in the region. Concerned with the serious challenge of access to life-saving medications for Africans at that time, the Commission made a passionate call to pharmaceutical companies to ensure that affordable and comprehensive health services, including quality affordable medicines, be made available to African governments in order to address the negative impact of HIV/AIDS.

Given the serious human rights violations that HIV-positive people were encountering at that time in Africa, this important resolution, which emphasises a rights-based approach to addressing the pandemic, could not have come at a better time. While one recognises the legal limitations of resolutions, there is no doubt that they remain important soft law to hold African governments accountable to their obligations under the African Charter and other international human rights instruments.[44] Although the African Commission did not specifically make any link between HIV/AIDS and same-sex relationships, it may be argued that the content of this resolution can be interpreted broadly as protecting the human rights of people in same-sex relationships in the context of HIV/AIDS. However, it would have been better if the Commission had specifically made reference to the plight of people in same-sex relationships. Studies have shown high HIV prevalence among people in same-sex relationships, especially men who have sex with men, in many African countries.[45] Given that most countries in Africa adopt punitive measures regarding same-sex relationships and the negative implications of this for the HIV prevention response in Africa,[46] the Commission could have broken its silence on the issue. The African Commission should have called on African governments to respect the human rights of people in same-sex relationships and to desist from adopting a punitive approach to same-sex relationships.

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43 African Summit on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, Abuja, Nigeria, 24-27 April 2001, OAU/SPS/ABUJA/3. It was agreed at this meeting that African governments should at least commit 15% of their annual budget to the health sector in order to address the HIV/AIDS pandemic.

44 See eg H Hillgenberg 'A fresh look at soft law' (1999) 10 *European Journal of International Law* 499.

45 See eg AD Smith *et al* 'Men who have sex with men and HIV/AIDS in sub-Saharan Africa' (2009) 374 *The Lancet* 416-422.

46 There are about 38 countries in Africa that currently criminalise same-sex relationships and intimacy, while in other countries laws relating to vagrancy and nuisance can be used to prosecute people in same-sex relationships. See S Ndashe 'The battle for the recognition of LGBTI rights as human rights' http://www.gwi-boell.de/web/lgbt-lgbti-rights-human-rights-africa-2324.html (accessed 31 October 2011).

More recently, the Commission has issued resolutions relating to topical issues affecting the sexual and reproductive lives of Africans. For instance, in 2008 the Commission issued two important resolutions dealing with access to medicines[47] and maternal mortality.[48] The need to promote and protect the sexual and reproductive health and rights of Africans, particularly African women, has, however, remained a great challenge. Women remain marginalised and vulnerable and therefore helpless and hopeless in matters relating to their sexual and reproductive well-being.

African governments are obligated to ensure that Africans, particularly women, have access to good quality and affordable medicines. This statement holds true for most African women as far as the issues of sexual and reproductive matters are concerned. Regrettably, however, the essence of article 16 of the African Charter, which guarantees 'the right to enjoy the best attainable state of physical and mental health and that states must ensure that everyone has access to medical care', is often rendered meaningless or unrealisable for many Africans. Therefore, the progressive position of the Commission relating to access to medicines is a welcome development as it coincides with the views of other commentators on the issue. For instance, Clapham notes that 'the most obvious threat to human rights has come from the inability of people to achieve access to expensive medicine, particularly in the context of HIV and AIDS'.[49] Similarly, Yamin notes that the denial of access to life-saving medications constitutes a great threat to the enjoyment of the rights to health and life guaranteed in international and regional human rights instruments.[50] According to the African Commission, the right to health is not limited to access to health care but to every other supporting treatment, management or service which promotes the highest attainable standard of health for everyone regardless of age, sex or gender.[51]

Influenced by General Comment 14 of the Committee on Economic, Social and Cultural Rights (ESCR Committee), the African Commission in its resolution on access to medicines urges African governments to ensure the availability, accessibility, acceptability and quality access of everyone to medicines. More importantly, the Commission reminds African governments that they have an obligation to respect, protect and fulfil access to medicines for their citizens. The Commission particularly emphasises that African governments must refrain from implementing intellectual property policies that do not take full advantage of all flex-

47 ACHPR/Res 141 (XXXXIIII) 08: Resolution on Access to Health and Needed Medicines in Africa.

48 ACHPR/Res 135 (XXXXIIII) 08: Resolution on Maternal Mortality in Africa.

49 A Clapham *Human rights obligation of non-state actors* (2006) 175.

50 AE Yamin 'Not just a tragedy: Access to medication as a right under international law' (2003) 21 *Boston University International Law Journal* 326.

51 See *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

ibilities in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[52] that promote access to affordable medicines, including the 'TRIPS-Plus' 'trade agreement'. This is a very significant statement, given that many commentators have expressed concerns with regard to the negative implications of the TRIPS Agreement on access to medicines in poor regions, including Africa.[53] Although TRIPS contains some flexibilities such as compulsory licensing, parallel importation and *bolar* exceptions, which African governments can invoke to facilitate access to medicines for their citizens, many African governments are failing in their obligations to explore these safeguards.[54] More significantly, the Commission mandates the Working Group on Economic, Social and Cultural Rights to further define states' obligations with regard to realising access to medicines and to develop monitoring tools to hold governments accountable. This is a positive development and it will go a long way to ensuring states' compliance with this resolution.

It should be noted that, although this resolution of the African Commission focuses on access to medicines in the context of HIV and AIDS, some of its contents can apply equally to maternal mortality. It is a known fact that pregnant women in many African countries lack basic access to common drugs or medicines such as pain relievers, and this often compounds their problems during pregnancy. Moreover, many women who are susceptible to malaria during pregnancy do not usually have access to anti-malaria drugs during pregnancy. It has been established that malaria during pregnancy can pose threats to the life of the woman and the unborn child.[55] Therefore, the resolution of

52 The TRIPS Agreement was part of the Final Act establishing the WTO, commonly referred to as the Marrakech Agreement, attached as Annex 1C to the WTO Agreement. While it may be argued that most African countries lack the manufacturing capacity to produce life-saving medications, opportunities exist under the safeguard provisions of TRIPS, which can be explored by African governments to facilitate access to medicines to their citizens if there really is the political will.

53 See eg MA Santoro 'Human rights and human needs: Diverse moral principles justifying Third World access to affordable HIV/AIDS drugs' (2006) 31 *North Carolina Journal of International Law and Commercial Regulation* 923; see also JM Berger 'Tripping over patents AIDS, access to treatment and the manufacturing of scarcity' (2001-2002) 17 *Connecticut Journal of International Law* 157; E 't Hoen 'TRIPS, pharmaceutical patents and access to essential medicines. Seattle, Doha and beyond' (2002) 3 *Chicago Journal of International Law* 31.

54 For more on this issue, see E Durojaye 'Compulsory licensing and access to medicines in the post-Doha era: What hope for Africa?' (2008) 55 *Netherlands International Law Review* 33; see also S Sacco 'A comparative study of the implementation in Zimbabwe and South Africa of the international law rules that allow compulsory licensing and parallel importation for HIV/AIDS drugs' (2005) 5 *African Human Rights Law Journal* 105.

55 In areas of Africa with stable malaria transmission, *P falciparum* infection during pregnancy is estimated to cause as many as 10 000 maternal deaths each year, 8% to 14% of all low birth weight babies, and 3% to 8% of all infant deaths. See Roll Back Malaria 'Malaria in pregnancy' http://www.rbm.who.int/cmc_upload/0/000/015/369/RBMInfosheet_4.htm 9 (accessed 29 September 2011).

the Commission on Access to Essential Medicines in Africa serves as a wake-up call for African governments to ensure that they make basic medicines, goods and services available to pregnant women.

Although at the juridical level, the rights to health and sexual and reproductive health remain unachievable in many countries, countries such as South Africa are making headway and setting the pace for many other African countries. This was demonstrated in the *Treatment Action Campaign v Ministry of Health* case (*TAC*).[56] In the *TAC* case, some South African NGOs, led by the Treatment Action Campaign, played a significant role in holding the South African government accountable for failing to ensure access to anti-retroviral therapy that could prevent mother-to-child transmission of HIV. The government was reminded of its obligation under international human rights law and the South African Constitution to respect, protect, promote and fulfil the right to health of South Africans.

Aside from the challenge posed by HIV/AIDS to lives in Africa, there is also a great need for African governments to address the alarming and worrisome rates of maternal mortality and morbidity in the region. As stated above, Africa remains the region that accounts for the highest numbers of maternal deaths each year. And for each woman that dies during pregnancy and childbirth, ten more suffer from debilitating injuries.[57] The issue of maternal mortality and morbidity has attracted media publicity and concern of various stakeholders, particularly civil society groups. Therefore, the African Commission could not help but respond to this continental outcry. The Commission's Resolution on Maternal Mortality[58] noted that African leaders were not doing enough to address the issue of high maternal mortality and morbidity in their respective countries. It was noted that maternal deaths and morbidity in Africa have shown no sign of abating, as Africa still accounts for more than 250 000 maternal deaths annually. Africa has continued to bear the largest burden of maternal deaths and injuries in the world with many African countries listed among those that have not made appreciable efforts in addressing maternal mortality.[59] Worried by this situation, the Commission urges that maternal mortality should be declared a state of emergency in Africa. Already there are fears that many African countries may fail to meet goal 5 of the Millennium Development Goals (MDGs),[60] which requires a 75 per cent reduction in maternal deaths by 2015.

More importantly, the African Commission notes that maternal mortality is a violation of women's rights to life, dignity and non-

56 2002 5 SA 721 (CC).

57 P Barate & M Temmerman 'Why do mothers die? The silent tragedy of maternal mortality' (2009) 5 *Current Women's Health Review* 231.

58 Resolution on Maternal Mortality (n 48 above).

59 WHO, UNICEF, UNFPA & World Bank *Maternal mortality in 2005* (2007) 18.

60 UN Millennium Declaration and Millennium Development Goals launched in 2000.

discrimination recognised under the African Charter and the African Women's Protocol. This is very important in the sense that framing maternal mortality as a human rights violation places obligations on governments, particularly African governments, to ensure that they take the necessary steps to address this health challenge. Conversely, a failure to do so will result in a breach of obligations under international law.[61] The Commission calls on African governments to adopt a rights-based approach to addressing maternal mortality in the region.

Disturbed by the poor mobilisation of resources to address maternal deaths in Africa, the African Commission reminds African governments of their commitment at the Abuja Declaration to allocate at least 15 per cent of their annual budgets to the health sector in order to meet health challenges such as HIV/AIDS and maternal deaths. The Commission further calls on African governments to include in their periodic reports as provided in article 62 of the African Charter the following:

- the general state of maternal health, including the level of mortality and morbidity and challenges faced in implementing related programmes;
- policy and institutional measures taken to give effect to the provisions of article 14 of the African Charter on the right to the best attainable state of physical and mental health for women;
- budgetary and institutional measures dedicated to securing maternal health;
- other programmes and activities undertaken to secure maternal health with results.

This is a welcome development as this will ensure that African governments give priority to addressing maternal deaths in their countries. It is not so much that Africa lacks the resources or manpower to prevent maternal deaths, but what is missing is the political will on the part of African governments.

The lack of access to quality maternal and reproductive health care, treatment and services at the regional level is of concern if one considers the number of women dying from complications arising from pregnancy or childbirth. Maternal deaths are preventable if only African governments have the political will to provide access to sexual and reproductive health care services, particularly family planning services, to women in the region. Various reports have shown that beyond the medical reasons that cause deaths during pregnancy or childbirth,

61 See eg RJ Cook *et al Advancing safe motherhood through human rights* (2001*);* see also E Durojaye 'The Human Rights Council's Resolution on Maternal Mortality: Better late than never' (2010) 10 *African Human Rights Law Journal* 189; V Boama & S Arukumaran 'Child birth: A rights-based approach' (2009) 106 *International Journal of Gynaecology and Obstetrics* 125-127; A Yamin & D Maine 'Maternal mortality as a human rights issue: Measuring compliance with international treaty obligations' (1999) 21 *Human Rights Quarterly* 563; F Leeuwen & R Amollo 'A human rights-based approach to improving maternal health' (2009)10 *ESR Review* 21.

other factors, such as the low status of women, weak health care systems, a lack of infrastructure, poor allocation of resources to address maternal and child care and hostile attitudes of health care providers also contribute.[62]

As stated above, the African Women's Protocol contains important provisions which enjoin African governments to take the steps necessary with a view to meeting the sexual and reproductive health needs (including maternal health needs) of women. One could argue that the increase in untimely and unnecessary deaths of many women and girls in Africa due to pregnancy-related complications undermine the purpose of the African Charter, the Women's Protocol and the existence of the African Commission as a whole. The Women's Protocol explicitly provides in article 14 for the right to health, including reproductive rights. The same provision expressly obligates African governments to 'establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding'. Unfortunately, services related to maternal health remain poor in many African countries. It should be noted that preventable maternal deaths violate a fundamental right protected in article 18 of the African Charter, which regards the African family as the 'natural unit and basis of the society' and 'the custodian of morals and traditional values recognised by the community'. One may ask what is left of a family if its foundation is eroded and left in shambles by a preventable maternal death and a total disregard for women's rights by a government.

So far, the African Commission is yet to issue any resolution relating to the rights of marginalised groups such as sex workers and people in same-sex relationships. Given the constant homophobic attacks on gays and lesbians and attempts by some African countries to enact harsh criminal laws against same-sex relationships, one would have expected that the African Commission would rise to the occasion by adopting a resolution that will affirm the fundamental rights of gays and lesbians. This will go a long way in urging African governments to safeguard the lives of people in same-sex relationships. The Commission can take a cue from the Organisation of American States, which adopted a resolution in 2008 entitled Human Rights Sexual Orientation and Gender Identity. The resolution condemns all acts of violence and human rights violations against all individuals based on their sexual orientation or gender identity.[63]

Most of the people in same-sex relationships daily encounter stigma and discrimination and live under constant fear and apprehension of violence. This calls for urgent intervention on the part of the African Commission, especially when one considers that the African Charter

62 Human Rights Watch (n 22 above); Amnesty International (n 22 above); Centre for Reproductive Rights (n 22 above).

63 Ndashe (n 46 above).

prohibits discrimination on various grounds, including 'other status'. Murray and Viljoen have argued that the use of the phrase 'other status' in the non-discrimination provisions of the African Charter necessarily covers the rights of people in same-sex relationships.[64] This submission tallies with the reasoning of the ESCR Committee in its General Comment 20 on non-discrimination.[65]

In addition to issuing resolutions on human rights issues in Africa, the African Commission also adopts special mechanisms such as the appointment of a Special Rapporteur to complement its promotional mandate.[66] For instance, the Commission has appointed a Special Rapporteur on the Rights of Women in Africa.[67] This Special Rapporteur on women gives specific attention to issues affecting women and deliberates on important matters that affect the rights of women in the region. The Special Rapporteur identifies and addresses any specific challenges facing women in the region. This list of issues is inexhaustive and may include violence against women, HIV, AIDS and access to sexual and reproductive health services for women. The Special Rapporteur may also seek information from governments, individuals or civil liberty groups in various countries on how a particular country is dealing with a specific human rights issue.

The Special Rapporteur's fact-finding mission activities are compiled into a report and the information gathered is submitted to the African Commission for further attention. In recent times, the reports of the Special Rapporteur have addressed some of the challenges relating to the enjoyment of sexual and reproductive health and rights of women.[68] The Special Rapporteur plays a significant role in the promotion

64 R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and the procedural possibilities before the African Commission on Human and Peoples' Rights' (2007) 29 *Human Rights Quarterly* 86.

65 UN ESCR Committee General Comment 20 on Non-Discrimination in Economic, Social and Cultural Rights E/C.12/GC/20, 25 May 2009.

66 The African Commission took the initiative to establish other procedures to supplement its initial mandate when it appointed for the first time in 1994 the Special Rapporteur on Extra-Judicial Killings, Summary and Arbitrary Executions in Africa, http://www.achpr.org/english/_info/prison_mand..html (accessed 28 September 2011).

67 The African Commission created the position of Special Rapporteur on the Rights of Women in Africa in 1998. The first Special Rapporteur, Commissioner Julienne Ondziel Gnelenga, served from 1998 to 2001; http://www.achpr.org/english/_info/index_women_en.html (accessed 28 September 2011).

68 See eg the Inter-Session Activity Report of the Special Rapporteur on the Rights of Women in Africa, Angela Melo, submitted to the 40th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 15-29 November 2006, which includes promotional activities to some African countries relating to the provisions of the African Women's Protocol, particularly art 14 and the issue of female genital mutilation; see also the Intercession Activity Report of the Special Rapporteur on the Rights of Women in Africa, Angela Melo, submitted to the 41st ordinary session of the African Commission on Human and Peoples' Rights Accra, Ghana, 16-30 May 2007, which contains promotional activities relating to violence against women and on collaborations reached with other organisations to provide

and protection of sexual and reproductive rights in Africa. Its mission should be respected by African governments when the latter are called upon or expected to implement necessary resolutions or a relevant human rights treaty at the national level.

Unfortunately, the Special Rapporteur has not given attention to the plight of lesbians across Africa. A recent spate of violence and sexual abuse of lesbians, especially in Southern African, requires the Rapporteur's urgent attention. There are documented reports of sexual attacks, including what is known as 'corrective rape', against lesbians.[69] This is an unfortunate development, which further undermines the human rights of people in same-sex relationships. The Special Rapporteur should embark on mission visits to some of the countries where these acts of sexual abuse are rampant. Where necessary, the Special Rapporteur should make a strong statement condemning such acts and call on African governments to uphold the human rights of gays and lesbians.

3.2 Jurisprudence of the African Commission in relation to sexual and reproductive health and rights

This section examines the jurisprudence of the African Commission as it relates to access to health services, including sexual and reproductive health services and violence against women. It is important to bear in mind that since the establishment of the African Commission, few cases have been brought before it that directly touch on the two issues discussed here. Therefore, the discussion includes other cases which may be indirectly relevant to the focus of the discussion. It is surprising that despite the poor health situation in Africa and the fact that African women continue to bear the greatest burden of sexual and reproductive ill-health in the world, few cases that challenge these violation have been brought before the African Commission.

Perhaps one of the reasons for the dearth of cases on sexual and reproductive rights might be that most African countries do not recognise the right to health as an enforceable right under their national constitutions. Hence, it is often difficult to litigate on issues relating to this right. However, given that the African Charter recognises the right to health, there is nothing preventing civil society organisations in Africa from filing cases in their countries to challenge the violation of the right

training for the members of the African Commission on the issue of sexual and reproductive rights; Intercession Activity Report of the Special Rapporteur on the Rights of Women in Africa, Soyata Maiga, submitted to the 45th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, May 2009, where the Special Rapporteur enjoins African governments to ensure access to sexual and reproductive health services, including contraceptive services to girls and women in the region.

69 See JA Nel & M Judge 'Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses' (2008) 21 *Acta Criminologica* 19.

to health, including sexual and reproductive rights. While it is agreed that litigating such cases might be challenging before national courts, civil society organisations can be more creative in their approach to redress violations of the right to health by seeking remedies based on recognised rights such as the rights to life, dignity, privacy and non-discrimination.[70]

Another reason why cases relating to sexual and reproductive rights have not been brought before the African Commission has to do with the controversial nature of these rights. As noted earlier, in many societies, including African societies, issues relating to sexual and reproductive rights remain contested and are viewed with suspicion. Due mainly to cultural and religious sentiments, many Africans still perceive issues relating to sexual and reproductive rights as threats to the moral fabric of their societies. Indeed, issues such as abortion and same-sex relationships are regarded as ungodly and unacceptable in most African societies.[71] Moreover, due to patriarchal tradition, violence against women is often condoned and not viewed as a human rights violation,[72] while homophobic attacks on people in same-sex relationships are on the increase.

In discussing the jurisprudence of the African Commission as it relates to any socio-economic rights issue, the starting point should be the *locus classicus SERAC*.[73] In that case, two NGOs brought an action on behalf of the Ogoni people against the state oil company, the Nigerian National Petroleum Company, which is also the majority shareholder in a consortium with Shell Petroleum Development Corporation. It was stated in the action that operations of these organisations had caused gross environmental degradation and health problems resulting from the contamination of the environment of the Ogoni people.

The action further alleges that the oil consortium had exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, and that they had deposited toxic waste into the environment and local waterways in violation of applicable international environmental standards. The consortium had also neglected and/or failed to maintain its facilities, causing numerous avoidable spills in the proximity of villages. The resultant contamination of water, soil and air has had serious short and long-term effects on health, including skin infections, gastro-intestinal and respiratory ailments, increased risk of cancer, and neurological and reproductive problems. The action

70 See eg E Durojaye 'Litigating the right to health in Nigeria: Challenges and prospects' in M Killander (ed) *International human rights law and domestic human rights litigation in Africa* (2010) 149.

71 The Zimbabwean Supreme Court in *Banana v The State* (2000) 8 BHRC 345 held that homosexuality is 'unAfrican' and 'ungodly'.

72 See eg EG Krug *et al World report on violence and health* (2002); Human Rights Watch *Scared at school: Sexual violence against girls in South African schools* (2001); N Toubia *Female genital mutilation: A call for global action* (1995).

73 *SERAC* case (n 40 above).

alleged that the Nigerian government had failed or neglected to monitor the activities of the oil companies operating in the country, and as such was responsible for the human rights violations that had occurred in Ogoniland. Therefore, it was alleged that the rights to life, non-discrimination, health and a healthy environment of the Ogoni people had been violated.

The African Commission agreed with the complainants by holding that the failure on the part of the Nigerian government to monitor the activities of oil companies in Ogoniland was responsible for the violations of the rights to health, life, a healthy environment and discrimination, which are guaranteed under the African Charter. This became the first case where the African Commission adjudicated on the violation of socio-economic rights, including the right to health, under the African Charter. The importance of the *SERAC* case is that it can be relied on to advance access to sexual and reproductive health care services in Africa.[74] In essence, a denial of access to sexual and reproductive health care services as evidenced in unmet contraceptive needs and high maternal mortality rates may amount to a violation of the right to health of Africans. Therefore, where an African country fails to meet the preventive, palliative and curative health needs, including the sexual and reproductive needs of its people, such a state may be in violation of article 16 of the African Charter.

More importantly, the *SERAC* case upholds the doctrine of due diligence, which is to the effect that a violation of human rights, especially the right to health, may occur if a state fails to control or regulate the activities of third parties. It should be recalled that in the UN Declaration on Violence against Women[75] it is affirmed that a state will be held accountable for acts of violence perpetrated against women, if the state fails to take the necessary steps to prevent such acts of violence from occurring. Thus, it is a welcome development that the African Commission has adopted this principle as it is useful in advancing sexual and reproductive rights in the region. It can be relied on to hold African governments accountable for various forms of violence against women, particularly homophobic attacks on lesbians, which are often perpetrated by non-state actors across the region. Moreover, in the context of access to life-saving medications in the region, it can be argued that the failure by African governments to regulate the activities of pharmaceutical companies with regard to the high cost of patented medicines will amount to a breach of the obligation to protect the right to health, including sexual and reproductive rights.

While it may be said that the *SERAC* case laid down the foundation for the affirmation of the right to health under the African Charter, it was

74 It is important to point out that, unlike the newly-established African Court on Human Rights, the decisions of the African Commission do not have a binding effect on African states.

75 Declaration on the Elimination of Violence against Women A/RES/48/104.

in the *Purohit* case[76] that the African Commission explicitly explained the nature of the right to health guaranteed under the African Charter. In this case, the complainants alleged that legislation governing mental health in The Gambia was outdated. It was also alleged that within the Lunatics Detention Act (the principal instrument governing mental health) there is no definition of what a lunatic is, and there are no provisions and requirements establishing safeguards during the diagnosis, certification and detention of patients. The complainants further alleged that there is overcrowding in the psychiatric unit, no requirement of consent to treatment or subsequent review of continued treatment and that there is no independent examination of administration, management and living conditions within the unit itself. Thus, it was alleged that violations of the rights to health, non-discrimination, dignity and privacy had occurred.

The African Commission reasoned in the case that the right to health guaranteed under the African Charter embraces health facilities, goods and services. According to the Commission, the 'enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms'. [77] The Commission stated further that the right included the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind. What can be deduced from this decision is that the realisation of the right to health for Africans will necessarily include ensuring access to emergency obstetrics care services for women and contraceptive services to prevent unwanted pregnancies.

This statement of the African Commission is *in tandem* with the reasoning of the ESCR Committee in its General Comment 14 where the Committee notes that '[t]he right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health'.[78] With regard to the obligations of African governments to realise the right to health under the African Charter, the African Commission notes as follows:[79]

> The African Commission would, however, like to state that it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into article 16 the obligation on the part of states party to the African Charter to take concrete and targeted

76 *Purohit* (n 51 above).

77 *Purohit* (n 51 above) para 80.

78 'The right to the highest attainable standard of health' UN Committee on Economic, Social and Cultural Rights, General Comment 14, UN Doc E/C/12/2000/4, para 12.

79 *Purohit* (n 51 above) para 84.

> steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.

At first instance, one may be tempted to think that the African Commission is making excuses for the failure on the part of African governments to meet the health needs – including sexual and reproductive health rights – of their people. On the other hand, it could be argued that the Commission is here reinstating the notion of a progressive realisation of the right to health. This is an important fact that cannot be ignored, particularly in a region such as Africa where a considerable number of the people live in deplorable conditions and contend with other challenges such as conflicts and under-development. However, the fact that the Commission requires African governments to take 'concrete and targeted steps' regarding the realisation of the right to health, may imply that a lack of resources or poverty will not suffice as an excuse by African governments for failing to realise the right to health, including the sexual and reproductive health of their citizens. The Commission seems to be echoing a similar view held by the ESCR Committee on the same issue. In General Comment 3, the ESCR Committee has observed that the crucial point to note in interpreting article 2 of ICESCR is to determine whether a state is *unwilling* or *unable* to fulfil its obligations with regard to socio-economic rights, including the right to health, under the Covenant.[80] In other words, even in a state of poverty a state party will still be expected to demonstrate that 'every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[81] Explaining this further in General Comment 14, the ESCR Committee notes as follows:[82]

> If resource constraints render it impossible for a state to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above.

Given the grave sexual and reproductive health challenges facing many African countries, the African Commission's response could not have come at a better time. It is true that many African countries are poor and often regarded as underdeveloped. However, it is also true that African countries are given to misappropriation of resources and remain among the most corrupt in the world.[83] Therefore, the problem

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80 'The nature of states parties' obligations' UN Committee on Economic, Social and Cultural Rights General Comment 3, 5th session, UN Doc E/1991/23, Annex III (our emphasis).

81 General Comment 3 (n 80 above) para 10.

82 General Comment 14 (n 78 above) para 47.

83 See Transparency International Corruption Perception Index 2010 http/www.transparency.org/cpi (accessed on 8 May 2011) where six out of the ten most corrupt countries are from Africa.

with Africa is not so much a lack of resources, but often a lack of priority setting coupled with endemic corruption and greed on the part of its leaders. Even with its scarce resources, Africa can still make an appreciable impact in meeting the health needs, including the sexual and reproductive health needs, of its people. This is true for an issue such as maternal mortality, where experience has shown that preventing women from dying during pregnancy or childbirth does not really cost much but requires the political will on the part of African governments to address this challenge. This interpretation is significant when one takes into consideration the copious provisions relating to the right to health guaranteed in article 14 of the African Women's Protocol.[84]

Undoubtedly, the provisions of the African Women's Protocol remain the most radical and comprehensive with regard to the realisation of the right to health, including sexual and reproductive rights, in the region. It is hoped that in future when the opportunity comes to interpret this provision it will receive a generous interpretation from the African Commission or the African Court, as the case may be. Recently, the Commission demonstrated a proactive stance by referring a case concerning gross human rights violations in Libya to the African Court.[85] The Commission can take similar steps in future against any African state found to be in gross violation of the sexual and reproductive rights of its citizens. For instance, the Commission can refer to the African Court the needless deaths arising from pregnancy or childbirth or even homophobic attacks on people involved in same-sex relationships. This would be so if it is found that a state party fails to take adequate measures to prevent such deaths or acts of violence.

Moreover, since the African Court will ultimately be responsible for interpreting the provisions of the African Women's Protocol, it will be useful for the African Court to draw inspiration from the decisions of international and regional human rights bodies. For instance, the European Human Rights Commission has held that a state may be in violation of the right to life guaranteed under article 2 of the European Charter if it fails to prevent unintentional loss of life during pregnancy or childbirth.[86] More recently, the CEDAW Committee in the case of *Alyne v Brazil* has explained that the failure of a state to provide emergency obstetrics care for a pregnant woman amounts to violations of the rights to life, non-discrimination and health guaranteed under CEDAW.[87] Also, the European Court of Human Rights held that laws criminalising same-sex relationships may be in violation of the right to

84 African Women's Protocol (n 19 above).

85 African Court on Human Rights decision in *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* Application 004/2011 delivered on 25 March 2011.

86 *Tavares v France* App 16593/90 European Court of Human Rights.

87 CEDAW Committee Communication 17/2008 decided at the 49th session, 11-29 July 2011.

private life guaranteed under article 8 of the European Charter.[88] Such a generous interpretation must clearly articulate the roles and responsibilities of African governments with regard to advancing sexual and reproductive health in the region.

In the *Doebbler* case,[89] the African Commission was called upon to determine whether article 152 of the Sudanese Criminal Law of 1991, which imposes fines or lashes upon conviction of girls, was in violation of the law. In that case, eight Muslim university students on a picnic were arrested and charged with committing, in a public place, acts contrary to public morality, prohibited under article 153 of the Sudanese Criminal Law of 1991.[90] The provision of that law prohibits acts such as girls kissing, wearing trousers, dancing with men, crossing legs with men and sitting and talking with boys. The girls were subsequently convicted and sentenced to fines and lashes, to be carried out in public under the supervision of the national court. The complainants alleged that the punishment violated article 5 of the African Charter. In upholding the claim of the complainants, the African Commission notes that article 5 of the Charter prohibits not only cruel, but also inhuman and degrading treatment. This includes actions that may cause serious physical or psychological suffering, and which humiliate or force the individual against his or her will or conscience.

The African Commission further reasons that the provisions of article 5 of the African Charter deserve a broad interpretation. Thus, the Commission concluded that the prohibition of torture, cruel, inhuman or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuse. Citing with approval the decision of the European Court of Human Rights in *Tyrer v United Kingdom*,[91] the Commission noted that even lashings that were carried out in private, with appropriate medical supervision, under strictly hygienic conditions, and only after the exhaustion of appeal rights, violated the rights of the victim. According to the Commission:[92]

> There is no right for individuals, and particularly the government of a country, to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning state sponsored torture under the Charter and contrary to the very nature of this human rights treaty.

88 See eg *Dudgeon v United Kingdom* (1981) 4 EHRR 149.

89 *Curtis Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003).

90 Art 152 of the Sudanese Criminal Law of 1991 provides as follows: '1 Whoever commits, in a public place, an act, or conducts himself in an indecent or immoral dress, which causes annoyance to public feelings, shall be punished, with whipping, not exceeding forty lashes, or with fine, or with both. 2 The act shall be deemed contrary to public morality, if it is so considered in the religion of the doer, or the custom.'

91 (1978) 2 ECHR 1.

92 *Tyrer* (n 91 above) para 42.

This outcome of the *Doebbler* case provides a good basis for arguing that acts of violence against women, particularly violent attacks on lesbians, amount to a violation of article 5 of the African Charter.

The reasoning of the Commission in the *Doebbler* case can be useful in holding African governments accountable for a failure to address appalling maternal mortality ratios in the region. For instance, the poor state of health care systems in Africa and the hostile attitudes of health care providers towards pregnant women, which often lead to maternal mortality and morbidity, may amount to cruel, inhuman and degrading treatment of women. This is because pregnancy often entails some physical and psychological adjustments. The Human Rights Committee in *KL v Peru* has held that forcing a woman to carry a potentially dangerous pregnancy to term may amount to an act of cruel inhuman and degrading treatment.[93] Although this case relates to abortion, the reasoning of the Human Rights Committee can also apply to maternal mortality, especially when a state fails to prevent an unwanted pregnancy by ensuring access to family planning services, which ultimately results in the loss of a woman's life.

In addition to its jurisprudence, another opportunity for the African Commission to advance sexual and reproductive rights is through monitoring reports submitted by state parties. The Commission may include in the guidelines for submission of reports steps that have been taken by African governments to address important sexual and reproductive health matters such as maternal mortality and discrimination against people in same-sex relationships. Also, the Commission through its concluding observations and recommendations to states can remind African governments of their obligations to respect and fulfil the sexual and reproductive rights of their citizens. Indeed, the Commission has specifically addressed issues relating to sexual and reproductive rights in some of its concluding observations and recommendations to states.[94] This is a positive development on the part of the Commission and deserves to be commended.

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93 Human Rights Committee Communication 1153/2003, decided at the 85th session of the Committee held from 17 October to 3 November 2005.

94 See eg the Concluding Observations and Recommendations of the African Commission to Egypt, adopted at the 37th ordinary session of the African Commission held from 27 April to 11 May 2005, Banjul, The Gambia, where the Commission urges the Egyptian government to address gender inequality in its laws and step up action in addressing female genital mutilation; See also the Concluding Observations and Recommendations of the African Commission to Ethiopia adopted at the 47th ordinary session of the African Commission held from 12-26 May 2010, Banjul, The Gambia, where the Commission expresses concerns about some cultural practices that continue to infringe on the rights of the girl-child, the lack of appropriate legislation to address FGM, HIV/AIDS-related stigma and discrimination and gender-based violence, high infant and maternal mortality rates and preventable deaths arising from diseases such as malaria and tuberculosis in the country. The Commission urges the Ethiopian government to adopt appropriate measures, including the enactment of legislation and the implementation of programmes and policies to address these challenges.

4 Conclusion

The article shows that the realisation of sexual and reproductive rights remains problematic in African countries. Moreover, it notes that the African Commission is in a pivotal position to advance sexual and reproductive rights in the region. Although the international community is committed to promoting human rights and promoting women's rights in Africa, little success has been achieved. Despite the commitment of various human rights institutions, including the Commission, there is still much more to be done in order to realise the sexual and reproductive rights of women in Africa and their counterparts in other developed regions. Significant success cannot be achieved when most African leaders have failed and are still failing to implement the African Women's Protocol and relevant provisions of CEDAW, particularly as regards meeting the sexual and reproductive health and rights of women irrespective of their socio-economic, cultural or religious backgrounds. The efforts of the Commission are further undermined by the fact that its resolutions cannot be legally enforced. Hopefully, the establishment of the African Court will remedy this deficiency. As noted earlier, the decisions of the Court can be enforced against member states that have ratified the Protocol that established the Court.[95]

While it is noted that the African Commission is yet to clearly develop a consistent jurisprudence regarding sexual and reproductive rights, it has through its promotional and protective mandates made important contributions to the advancement of sexual and reproductive rights in the region. The contribution of the African Commission to the advancement of sexual and reproductive rights seems to be more pronounced in its promotional mandate than its protective mandate. This is because very few communications have been brought before the Commission that directly relate to sexual and reproductive rights. This is a cause for concern considering the vibrant nature of civil society organisations in the region.

Furthermore, while it may be argued that the African Commission is not averse to advancing sexual and reproductive rights in Africa, however, it is important to mention that the Commission can do better. From the discussion above, it would seem that the Commission has paid greater attention to reproductive than sexual health and rights. Therefore, the Commission needs to pay more attention to the plight of sexual minorities and marginalised groups such as sex workers and homosexuals. In this regard, the refusal of the Commission during its 48th ordinary session to grant observer status to an organisation known as Coalition of African Lesbians does not tally with its commitments to address all forms of discrimination on various grounds,

95 See art 5 of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights.

including 'other status'.[96] With the establishment of the Committee on the Protection of the Rights of People Living with HIV and Those at Risk, Vulnerable to and Affected by HIV,[97] during its 47th ordinary session, an important opportunity now exists for the African Commission to address the human rights of sexual minorities, including people in same-sex relationships.

96 Ndashe (n 46 above).

97 See Resolution ACHPR/Res163(XLVII)2010. The mandate of the Committee includes giving special attention to persons belonging to vulnerable groups, including women, children, sex workers, migrants, men having sex with men, intravenous drugs users and prisoners.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Have the norms and jurisprudence of the African human rights system been pro-poor?

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Summary

Drawing upon the important insight of critical human rights scholars that 'pro-human rights' are not necessarily 'pro-poor', this article mainly utilises Baxi's germinal thesis on the emergence of a trade-related market-friendly human rights (TREMF) paradigm (that is slowly but surely displacing what he refers to as the UDHR paradigm, much to the advantage of global capital and the rich/powerful/elite, and greatly to the disadvantage of the poor) in assessing the extent to which the norms and jurisprudence of the African human rights system have been pro-poor. After demarcating its scope, outlining its limitations and offering an explanation of the conception of poverty that animates its use of the terms 'the poor' and 'pro-poor', the article analyses the relevant norms and jurisprudence of the African system in the context of the conceptual framework of the study, and concludes that these norms and jurisprudence have tended to be animated by an anti-TREMF (and pro-UDHR paradigm) sensibility, ethic and politics, and have for this and other reasons been more or less pro-poor in orientation. While these findings show that the TREMF paradigm has not completely eaten away at the pro-poorness of the textual

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affirmations of human rights that guide and have been produced by such international human rights systems, and such texts are important enough in 'loosely' framing and shaping human rights that their character must be carefully studied, it must still be cautioned that such textual affirmations are not self-executing. They must be implemented in the concrete sense by governments, peoples, corporations, institutions and other agents for them to really matter. It should therefore be kept in mind that it is at this level, the level of the 'living' human rights law (that is, the law as it is actually experienced by ordinary people) that the TREMF paradigm's ultimate impact is to be observed. This suggests that the TREMF paradigm may have exerted more influence in the living world than this study (focused as it largely is on 'the text') might suggest.

1 Introduction

As critical human rights scholars (such as Baxi and Rajagopal) have noted, the expression 'human rights' is capable of accommodating both elite and subaltern politics, both progressives and reactionaries, and both the politics of domination and the politics of liberation or insurrection.[1] For instance, as is well known, both the Egyptian freedom fighters who marched on and massed in Tahrir Square in early 2011 (an admirably progressive and insurrectionary movement) and the neo-Nazi's who all too frequently terrorise racial and other minorities in Europe and North America (a virulently reactionary movement) have laid credible claim to the protection of the human rights to freedom of expression and assembly.[2] As such, it is fair to say that not every human rights claim, practice, judicial/administrative decision or system will – on the balance – be pro-poor. While some human rights politics, claims, decisions or even systems have tended to be more pro-poor than pro-elite, the converse has been true for others. It is therefore imperative that scholars and observers of governance systems and institutions on the African continent as elsewhere not assume that 'pro-human rights' necessarily translates to 'pro-poor'.[3]

It is against this background that this article examines the extent to which the norms and jurisprudence of the African human rights system have been pro-poor. To what extent have the norms of the African

1 See U Baxi *The future of human rights* (2002) 6; B Rajagopal 'Pro-human rights but anti-poor? A critical evaluation of the Indian Supreme Court from a social movement perspective' (2007) 8 *Human Rights Review* 157 158. See also See OC Okafor 'Attainments, eclipses and disciplinary renewal in international human rights law: A critical overview' in D Armstrong (ed) *Routledge handbook of international law* (2009) 303.

2 'Egypt revolution 2011: A complete guide to the unrest' *Huffington Post* http://www.huffingtonpost.com/2011/01/30/egypt-revolution-2011_n_816026.html (accessed 18 May 2011); 'European neo-Nazi's move to the US for free speech' http://rt.com/usa/news/neo-nazis-usa-free-speech (accessed 27 June 2011).

3 See Rajagopal (n 1 above).

system (that is, the African Charter on Human and Peoples' Rights (African Charter) itself, as the main constitutive instrument of the African system, its Women's Protocol, and the Resolutions passed by the African Commission on Human and Peoples' Rights (African Commission) been pro-poor? And to what extent has the jurisprudence of the African Commission been pro-poor?

Given the fact that almost all of the body of work of the African Court on Human and Peoples' Rights (African Court) still lies ahead, and there is very little, if any, substantive evidence to go on at the moment with regard to the Court's engagement with the claims of poor people in Africa, the article does not focus on that admittedly important component of the African system. The analysis of that Court's receptiveness to the claims of the poor, or the lack thereof, must therefore be deferred to a future occasion.

Another important (if justifiable) limitation of the article is that, although the indivisibility and interdependence of all human rights norms have now been well established, and are accepted by the authors, and civil and political rights jurisprudence (or struggles for the enthronement of similar values) can contribute significantly to the amelioration of poverty and the enhancement of the social conditions of the poor,[4] the article's interrogation of the norms and jurisprudence of the African human rights system with regard to the extent of their receptiveness to the claims of the poor focuses on the economic and social rights norms and jurisprudence of that system (broadly construed). Other than for reasons of space, the focus on economic and social rights is justified by the fact that the deprivation of this category of human rights is more directly and immediately tied to the production and maintenance of impoverishment and poverty in Africa, as elsewhere. What is more, as Pogge has noted, economic and social rights are also by far the most violated category of rights, a fact that has had dire consequences for the enjoyment of the historically far more favoured civil and political rights.[5] As Pogge puts it:[6]

> Socio-economic human rights, such as that 'to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, and medical care' (UDHR, art 25) are currently, and by far, the most frequently violated human rights. Their widespread violation also plays a decisive role in explaining the global deficit in civil and political human rights which demand democracy, due process, and the rule of law: Very poor people – often physically and mentally stunted due to malnutrition in infancy, illiterate due to lack of schooling, and much preoccupied with their family's survival – can cause little harm or benefit to the politicians and officials who rule them. Such rulers therefore have far less incentive to

4 See SR Osmani 'Poverty and human rights: Building on the capability approach' (2005) 6 *Journal of Human Development* 206.

5 T Pogge 'Recognised and violated by international law: The human rights of the global poor' (2005) 18 *Leiden Journal of International Law* 717 718.

6 As above.

attend to the interests of the poor compared with the interests of agents more capable of reciprocation, including foreign governments, companies, and tourists.

It is for all these reasons that our analysis in this article concentrates on the economic and social rights norms and jurisprudence of the African system; which is admittedly only one dimension of the poverty question. Nevertheless, it should be kept in mind that it is a highly important and understudied dimension of that question.

2 Conceptual framework

It is important at this juncture, however, to develop and define the notion of poverty that undergirds and frames our conceptions of 'the poor' and 'pro-poor'. As may be clear to some, *poverty* now tends to be conceived of in the relevant literature sets not merely in terms of material deprivation, but – following Sen's important work – *also* in terms of 'a very low level of well being',[7] or as 'the denial of opportunities and choices basic to human development'.[8] More quantitatively, following the World Bank's work on the subject, Pogge tends to utilise either the 'one-dollar-a-day' measure or its 'two-dollars-a-day' counterpart.[9] It is also imperative to factor into our analyses of the issue the growing feminisation of poverty and its disproportionate impact on females.[10] Thus, in this article, the expression 'poverty' includes any incidence of the fundamental deprivation, and/or of the serious lack of basic needs (such as food, water, shelter, education, clothing and essential medicines). Yet, it must be kept in mind that the article focuses on the latter, that is, the lack of basic needs component of the equation. Therefore the expression 'the poor' refers to those whose lives are characterised by this kind of poverty; and the term 'pro-poor' refers to any phenomenon, decision, system, and such, that favours or contributes to the amelioration or elimination of this kind of condition of poverty.

It is also important from a conceptual perspective to develop and explain early on in the article the nature of the measure(s) or barometer(s) of 'pro-poorness' or 'anti-poorness' that also inform and frame our assessment of the quality of the African system's sensitivity to, and engagement with, the claims of the poor. As Shivji has shown, the starting point for this exposition must be a reference to the (relative) divorce between individual rights jurisprudence and

7 See Osmani (n 4 above).

8 W van Genugten & C Perez-Bustillo (eds) *The poverty of rights: Human rights and the eradication of poverty* (2001).

9 T Pogge *World poverty and human rights* (2002).

10 PI Ozo-Eson 'Law, women and health in Nigeria' (2008) 9 *Journal of International Women's Studies* 285.

fundamental questions of socio-economic justice that was historically imposed by and within the dominant liberal human rights paradigm and discourse.[11] This relative divorce was made manifest in a number of ways, including the human rights versus development binary opposition argument between many 'Third World' leaders and many in the geo-political West;[12] and the emergence in the mid-1960s of two separate and unequal international human right covenants – the one on civil/political rights and the other on economic, social and cultural rights.[13]

More recently, though, attempts have been made to (re)marry human rights to socio-economic justice, in part through the increasing acceptance of the equality in status and interdependence of economic/social rights and civil/political rights,[14] the attempts to (re)marry human rights to development, and efforts to achieve the opposite.[15]

Many scholars are, however, skeptical – to say the least – of the success of this (re)marriage. Some, like Mathews and Baxi, correctly see this touted (re)marriage as still more rhetorical than real.[16] For them, the 'actually existing' marriage seems to be between human rights and market ideology (and at worst between human rights and market fundamentalism), much to the disadvantage of the poor.[17] To Baxi, a new human rights paradigm has emerged as the result, one that I will henceforth refer to as the trade-related market-friendly (TREMF) paradigm.[18] In Baxi's words:[19]

> The paradigm of the Universal Declaration of Human Rights is being steadily, but surely, *supplanted* by that of trade-related, market-friendly [or TREMF] human rights. This new paradigm seeks to reverse the notion that universal human rights are designed for the attainment of dignity and well-being of human beings [as opposed to local or global capital, etc] and for enhancing the security and well being of socially, economically and civilisationally vulnerable peoples and communities [in other words the poor].

In the main, the detailed character of this TREMF paradigm as theorised by Baxi is that it (i) favours global capital's property interests mostly at the direct expense of the most vulnerable human beings (that is,

11 I Shivji 'Constructing a new rights regime: Promises, problems and prospects' (1999) 8 *Social and Legal Studies* 253 257-261.

12 As above

13 H Steiner *et al International human rights in context: Law, politics, and morals* (2007) 263.

14 See Vienna Declaration and Programme of Action http://www.unhchr.ch/ huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en (accessed 27 June 2011).

15 S Mathews 'Discoursive alibis: Human rights, Millennium Development Goals and poverty reduction strategy papers' (2007) 50 *Development* 76 78-79.

16 As above; Baxi (n 1 above) 132-145.

17 As above.

18 Baxi (n 1 above).

19 Baxi (n 1 above) 132.

the poor); [20] (ii) protects global capital against political instability and market failure, usually at a significant cost to the most vulnerable among its own citizens (that is, the poor);[21] and (iii) denies a significant redistributive role to the state, calling upon it to free as many spaces for capital as possible, initially by pursuing the three-Ds of contemporary globalisation, that is, deregulation, denationalisation and disinvestment,' and thereby disadvantaging the poor.[22]

On the whole, therefore, it appears that the turn toward the TREMF human rights paradigm that Baxi has identified has tended to disadvantage the poor in favour of global capital and the rich/powerful/elite actors who tend to control and benefit from capital in greatly disproportionate measure. Given the massive uprisings and discontent among the world's poor that resulted from the introduction in many African and other Third World states of the TREMF-style economic policies that characterised the structural adjustment programmes of the 1980s and 1990s, it can reasonably be surmised that those economic policies were more or less anti-poor, or were – at the very least – experienced as such by the vast majority of the world's poor. It should not then surprise the keen observer that the similarly-oriented TREMF human rights paradigm would tend to function as anti-poor.

If this premise is accepted, then the chief questions that remain to be answered in this article are: To what extent have the norms and jurisprudence of the African system been TREMF-like, and therefore anti-poor? And to what extent have those norms and jurisprudence *not* been TREMF-like, and thus pro-poor? Put differently, do the norms and/or jurisprudence of the African system undermine or support the emergent TREMF human rights paradigm?

However, it should be noted that, while the Baxian thesis on the move to a TREMF paradigm is the primary optic through which we view the norms and jurisprudence of the African system that are analysed in the article, it is not the sole such optic. It is supplemented in the appropriate places and, when necessary, by a more general analysis of the extent to which the relevant norm or jurisprudence either promotes/protects or undermines the interests of the poor (as defined in this section of the article).

3 African human rights norms and the claims of the poor

The African Charter came into existence in the shadows of a fierce debate on the relationship between civil and political rights, on the one hand,

20 As above.

21 Baxi (n 1 above) 141.

22 Baxi (n 1 above) 139.

and economic, social and cultural rights on the other. The dimensions of that debate were carefully traced by Howard as questioning[23]

> whether the separate sets of rights embodied in the two 1966 Covenants on human rights are intrinsically related, such that they must be developed and enlarged simultaneously, or whether, on the other hand, one set of rights takes priority over the other. Are they in other words sequential or interactive?

Many people from Africa and the rest of the Third World did make their voices heard in that debate, their major point (at least at that point in history) being that 'economic, social, and cultural, but especially 'economic' rights (usually meant as the right to development) must take priority over civil and political rights'.[24]

Regardless of the merits of the prioritisation argument, its historical popularity among the ranks of African leaders and peoples should not surprise any keen student of African affairs. For, from the time of the drafting of the African Charter to this day, the African continent has been mostly defined to both insiders and outsiders by the poverty of all too many of her peoples. As Nhlapo somewhat hyperbolically suggests, one of the explanations for the slow progress of the struggle to enthrone the human rights ideal on the continent 'is provided by Africa's special conditions of poverty, ignorance, disease and lack of political sophistication afflicting the vast majority of the continent's peoples'.[25]

As such, one would expect that the widespread incidence of poverty on the continent did play on the minds of the designers of the African Charter which, after all, was conceived of as a mechanism to meet the needs of the continent and improve its political, social and economic conditions.[26] So notwithstanding that the term 'poverty' is not directly referenced in the African Charter (even though its Preamble commits state parties to that document to the elimination of such other social monstrosities as colonialism, neocolonialism, apartheid, and the dismantling of aggressive foreign military bases), that term seems to have nonetheless featured prominently in the consciousness or subconscious thinking of those who drafted that treaty. Instructive

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23 R Howard 'The full-belly thesis: Should economic rights take priority over civil and political rights? Evidence from sub-Saharan Africa' (1983) 5 *Human Rights Quarterly* 467 468.

24 As above.

25 RT Nhlapo 'International protection of human rights and the family: African variations on a common theme' (1989) 3 *International Journal of the Family* 1 2.

26 BO Okere 'The protection of human rights and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly* 141 145, quoting the Committee of Experts that drafted the Charter that they worked on the understanding that the 'African Charter on Human and Peoples' Rights should reflect the African conception of human rights' and 'should take as a pattern the African philosophy of law and meet the needs of Africa'.

in this regard is the relative pride of place that is accorded in the African Charter to guarantees of the right to development, and of other more commonly-protected economic, social and cultural rights,[27] as valuable resources in aid of those struggling to ameliorate in significant measure the prevalence of poverty on the continent. Against the prevailing orthodoxy at the time it was drafted, the African Charter stood on the side of the right to development. It also integrated in a single normative document two generations of rights that had been isolated in similar global and regional instruments.[28] The African Charter's tone was well set in its Preamble, which proclaimed that

> it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

It is against this background that Udombana describes the three categories into which the rights enshrined in the African Charter may be divided: libertarian rights (which are rights relating to the exercise of free will); egalitarian or equalitarian rights (that are established on the foundation of social equality and aimed at the just and equal distribution of economic and social goods); and solidarity rights (which are those rights not vested in individuals but in collective groups of individuals called peoples).[29] As discussed in the introduction to the article, our particular concern here is with those rights that fall within the rubric of egalitarian or equalitarian rights (that is, economic and social rights and similar kinds of rights, such as the right to development). As we have pointed out earlier as well, they are the rights that speak more directly to the living conditions of the poor and the deprived peoples of the African continent. They clearly fall within the category of the 'real needs' that a former Senegalese president had urged the drafters of the African Charter to keep constantly in mind.[30] And, according to

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27 As above.

28 DM Chirwa 'Toward revitalising economic, social, and cultural rights in Africa: *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*' (2002) 10 *Human Rights Brief* 14; JC Nwobike 'The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*' (2005) 1 *African Journal of Legal Studies* 129 140.

29 N Udombana 'Between promise and performance: Revisiting states' obligations under the African Human Rights Charter' (2004) 40 *Stanford Journal of International Law* 105 112-118.

30 Address of President Leopold Senghor to the Dakar Meeting of Experts Preparing the Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/X, reprinted in P Kunig *et al* (eds) *Regional protection of human rights by international law: The emerging African system* (1985). Senghor appeared to conflate 'rights' with "needs"'. Even though it is clear in theoretical terms, they do not mean one and the same thing. See eg J Waldron 'The role of rights in practical reasoning: "Rights"

Udombana, they also tend to have a strong positive dimension, in the sense that '*they enhance the power of the government* to do something for the person, to enable him or her in some way ...'[31]

What is more, not only did the African Charter enshrine these rights, but some writers have even suggested that they are privileged in contrast to civil and political rights. As Odinkalu has noted, the African Charter's Preamble[32]

> went much further than was implied in the principles of universality, indivisibility, and interdependence of human rights ... and appeared to suggest that the Charter would accord priority to economic, social and cultural rights over the so-called civil and political rights.

This is especially so as the relevant clause stated that satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights. But quite as significantly, the African Charter formulated those egalitarian rights as direct entitlements rather than mere aspirations in similar international and regional instruments.[33] Equally important is the Charter's failure to qualify the economic and social rights that it enshrines with such phrases as 'progressive realisation' and 'resource constraints'.[34]

Although, as we have seen, it is clear that the mere inclusion of economic and social rights in the dominant human rights discourse and jurisprudence, and its mere marriage to civil and political rights, will not on its own suffice to produce a real-life pro-poor social environment (since much more must be done in real life in order to actualise the presumed pro-poor ethic that animated that marriage in the first place), the relative pride of place that the Preamble and main text of the African Charter accords to economic and social rights, broadly construed (including the rights to development and some other so-called solidarity rights), does suggest that that treaty is significantly sensitive to the interests of the poor. It is also an indicator of its significantly anti-TREMF sensibility. For, given that, according to Baxi, the TREMF paradigm tends to require the protection of the property interests of the global elite/rich/powerful at the expense of the interests of the poor, and in view of the fact that the rich/powerful elite can usually get by much more easily than the poor in the absence of the protection of economic and social rights by the state, the emphasis that the African

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versus "needs"' (2000) 4 *Journal of Ethics* 115; M Tushnet 'An essay on rights' (1984) 62 *Texas Law Review* 1363

31 N Udombana 'Articulating the right to democratic governance in Africa' (2003) 24 *Michigan Journal of International Law* 1209 1224-1225 (our emphasis).

32 CA Odinkalu 'Analysis of paralysis or paralysis by analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327 337.

33 See Chirwa (n 28 above); F Coomans 'The *Ogoni* case before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749 751.

34 Steiner *et al* (n 13 above) 505.

Charter has placed on economic and social rights is strongly suggestive that it is imbued with a counter-TREMF ethic, or that it, at the very least, does not affirm that paradigm. As insufficient on its own as this textual orientation of the African Charter is to uplift the social conditions of the African poor, it is a good and auspicious beginning point. It can greatly resource the activists, judges, legislators, administrators and other actors who are minded to struggle in favour of the upliftment of the African poor.

It is also worth noting here that the fact that economic and social rights provisions, as Udombana has shown, tend to 'enhance the power of the government to do something' does strongly suggest that their inclusion in significant numbers in a human rights treaty pushes back against the TREMF paradigm which would, as Baxi has argued, tend to deny a significant redistributive role to the state, and call upon it to pursue deregulation, denationalisation, and disinvestment, thereby disadvantaging the poor.

Among the social and economic rights specifically guaranteed under the African Charter is the individual right to work under equitable and satisfactory conditions and the right of employees to receive equal pay for equal work, both under article 15. The right of individuals to enjoy the best attainable state of physical and mental health is enshrined in article 16 of the Charter. It enjoins all state parties to the Charter to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. In addition to the above-stated rights, the African Charter also provides for the right to education.[35] The Charter provides equally for the elimination of discrimination against women (who account for a disproportionate percentage of Africa's poor) and the protection of the rights of women and children as stipulated in international declarations and conventions.[36]

More problematically, the African Charter also guarantees the right to property, though it is explicitly stated that this right could be encroached upon in the interests of a public need or in the general interests of the community in accordance with the provisions of appropriate laws.[37] However, although the guarantee of the right to property in a human rights treaty is not necessarily pro or anti the TREMF paradigm that tends to harm the poor, and regardless of the fact that such an act of inclusion can in fact help protect the property of poor peoples, in the specific historical context of many African societies, this right has too often proven to be extremely harmful to the interests of the poor in those countries, and has far too frequently functioned as an obstacle in

35 Art 17.

36 See generally S Chant *Gender, generation and poverty: Exploring the 'feminisation of poverty' in Africa, Asia and Latin America* (2007); M Buvinic 'Women in poverty: A new global underclass' (1997) 108 *Foreign Policy* 38.

37 Art 14.

the way of socially-progressive land and other property tenure reform. Thus, such guarantees of the right to property as are contained in the African Charter can too often operate in a way that 'favours global [and/or local] capital's property interests mostly at the direct expense of the most vulnerable human beings (that is, the poor)'.[38]

Subject to the notable exception of certain interpretations and applications of the right to property, all of the rights discussed above could, in most contexts, more or less be legitimately placed under the umbrella of the category of rights described by Udombana as egalitarian/equalitarian. However, there are other rights in the genre he describes in solidaritarian terms that could equally address the conditions of the poor in Africa. For example, article 21(5) of the African Charter commits state parties to an undertaking to 'eliminate all forms of foreign economic exploitation, particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources'. Ease of implementation aside, the provision signals the African Charter's sensitivity to the activities not just of monopolies, but also of other agencies of foreign capital whose policies have, as has been argued elsewhere, contributed substantially to the impoverishing of all too many Africans.[39] This right is one of the most clearly anti-TREMF provisions in the African Charter. It directly and explicitly seeks to counter the ethic/jurisprudence that tends to favour global capital's property interests mostly at the direct expense of the poor, and can even be credibly read as somewhat opposed (at least to a high degree) to the now fashionable deregulation, denationalisation and disinvestment models of socio-economic governance and development.

In similar fashion, article 22 of the African Charter guarantees to all peoples the right to economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. It provides further that states shall have the duty, individually and collectively, to ensure the exercise of the right to development. While this provision does not clearly stipulate in any detail the particular ideology of development that animates it,[40] the mere fact that it imposes the development duty primarily on the African states that are party to the African Charter,[41] and the tenor of evidence from other normative statements of this right,[42] suggests

38 Baxi (n 1 above) 136.

39 OC Okafor 'Re-conceiving Third World legitimate governance struggles in our time: Emergent imperatives for rights activism' (2000) 2 *Buffalo Human Rights Law Review* 1.

40 See OC Okafor '"Righting" the right to development: A socio-legal analysis of article 22 of the African Charter on Human and Peoples' Rights' in S Marks (ed) *Implementing the right to development: The role of international law* (2008) 52.

41 As above.

42 As above.

that there is an extent to which this provision runs counter to the TREMF paradigm that tends to deny a redistributive role to the state and calls upon that institution to largely denationalise, disinvest and deregulate its economy. The provision is, at least, in this sense a pro-poor one. In any case, the attainment of people-led development (understood more progressively), the kind of development that seems to be suggested by the assigning of the right to development to 'all peoples' rather than 'all states', will tend to contribute to the significant amelioration of poverty among the relevant people.

Finally, regarding the norms of the African Charter itself, article 24 provides that all peoples shall have the right to a general satisfactory environment favourable to their development. Here again, this provision would appear to provide strong support to the effort to improve the living conditions of the poor, who to often bear the brunt of the devastation of the environment. For example, the anti-toxic waste dumping ethic and prohibition (which is clearly subsumed by the protection guaranteed under article 24 above) will disproportionately protect the world's poor, many of whom live on the African continent.[43] Yet, the kind of protection of global capital's profits that have been too often demanded by world leaders and larger corporations alike would tend to require looser environmental standards and regulations; a TREMF-like orientation. It is in this kind of sense that article 24 is anti-TREMF and pro-poor. But it should also be noted that a contrary argument can also be credibly made that the unrestricted implementation of this right in many developing societies can in fact depress economic activity and competitiveness, and therefore produce or accentuate poverty.

The African Commission has gone further to pass resolutions dealing with similar issues as are dealt with by its economic and social rights provisions. For example, in 2001 it passed a Resolution on HIV/AIDS Pandemic – Threat against Human Rights and Humanity[44] in which the Commission reminded itself of the provision of the African Charter to promote human and peoples' rights and ensure their protection in Africa, but especially as it relates to the right of every individual to enjoy the best attainable state of physical and mental health. The Commission declared the HIV/AIDS pandemic a human rights issue and called upon African governments and state parties to the Charter[45]

> to allocate national resources that reflect a determination to fight the spread of HIV/AIDS, ensure human rights protection of those living with HIV/AIDS against discrimination, provide support to families for the care of those dying of AIDS, devise public health care programmes of education and carry

43 CU Gwam 'Toxic waste dumping and the enjoyment of economic, social and cultural rights in Africa' (2008) 15 *African Yearbook of International Law* 237.

44 ACHPR/Res.53 (XXIX) 01 http://www.achpr.org/english/_doc_target/documentation.html?/ resolutions/resolution58_en.html (accessed 8 June 2011).

45 Gwam (n 43 above). See also T Kohi *et al* 'HIV and AIDS stigma violates human rights in five African countries' (2006) 13 *Nursing Ethics* 404.

> out public awareness especially in view of free and voluntary HIV testing, as well as appropriate medical interventions.

Here, the African Commission's insistence that states 'provide' support, programmes and free services clearly runs counter to the TREMF paradigm that tends to call on states to disinvest from the provision of public services and deregulate (and privatise) the economy as much as possible. Clearly, the Commission does see the African state playing a redistributive role to a significant degree. In this sense, then, and according to the conceptual framework outlined in the last section of the article, it is fair to conclude that both the Resolution and the Commission's jurisprudence here were pro-poor.

The African Commission has also passed a Resolution on the Situation of Women and Children in Africa at its session held from 21 May 21 to 4 June 2004.[46] In it the Commission described women and children in Africa as victims of multiple human rights violations and stated that children in particular are endangered by deportation, slavery, child trafficking and their proliferation as street children. It considered the persistence of traditional practices that are harmful to women and children and raised concern about 'widespread poverty among women and the stigmatisation of women and children with HIV/AIDS'. The African Commission therefore called on member states to protect women and children by, among other strategies, implementing programmes to fight against HIV/AIDS and helping women benefit from social security. This Resolution is pro-poor in our view, in part because it does show a high degree of sensitivity to the feminisation of poverty in Africa as in the rest of the world. It should also be noted that, by contributing to the normative de-legitimisation of 'modern day slavery' and child trafficking, the Resolution functions against the TREMF paradigm's promotion and protection of the property interests of local and global capital because these are the very categories of agents that tend to profit the most from such crimes. Furthermore, by urging states to 'implement programmes' to help the vulnerable, it affirms (not denies) the redistributive role of the state, thereby evincing a pro-poor orientation.

Further, the African Commission at its session held from 23 November to 7 December 2004 passed another Resolution on Economic, Social and Cultural Rights in Africa[47] in which it recognised 'the urgent need for human rights, judicial and administrative institutions in Africa to promote human dignity based on equality and to tackle the core human rights issues facing Africans, including food security, sustainable livelihoods, human survival and the prevention of violence'. Here again, the affirmation of a significant (though not exclusive) redistributive role for

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46 ACHPR/Res.66 (XXXV) 04 http://www.achpr.org/english/_doc_target/documentation.html?/ resolutions/resolution71_en.html (accessed 8 June 2011).

47 ACHPR /Res.73(XXXVI)04 http://www.achpr.org/english/_doc_target/documentation.html?/ resolutions/resolution78_en.html (accessed 8 June 2011).

the state in Africa (as is evidenced by its call on the state to ensure food security, and so on) undermines the TREMF paradigm to an extent and supports the causes of the poor.

However, an important qualification to the broadly pro-poor character of the African Charter is that its text does not contain a number of internationally-recognised economic and social rights. These omissions are unfortunate indications of the limits of the pro-poor ethic that animated the founders of the African system. It is for this reason that a couple of these rights had to be read into the African Charter by the African Commission in the now celebrated *Ogoni* case (discussed in the next section of this article).

Besides the African Charter, a number of derivative human rights instruments that clarify and emphasise specific themes within the general framework of the Charter's normative provisions exist. These instruments also address the situation of poor Africans. These include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),[48] the African Charter on the Rights and Welfare of the Child (African Children's Charter)[49] and the OAU (now AU) Convention Governing Specific Aspects of Refugee Problems in Africa.[50] Thus it appears that, for the most part, the texts of the economic and social rights norms of the African system are pro-poor in orientation. However, the notable exception of the right to property, which in the context of the African continent is less solidly either anti-TREMF or pro-poor, was discussed. In our view, the specific context in which this right is sought to be implemented will greatly shape its orientation as either pro- or anti-poor. In any case, it is only when they are read in context that the pro- or anti-poor orienta-

48 This Protocol includes such rights as those relating to economic and social welfare (art 13); health and reproductive rights (art 14): the right to food security (art 15); the right to adequate housing (art 16); the right to a healthy and sustainable environment (art 18); the right to sustainable development (art 19); rights of widows (art 20); the right of inheritance (art 21); special protection of elderly women (art 22); and special protection of women with disabilities (art 23).

49 The African Children's Charter reinforced some general provisions of the main Charter by directing them specifically to the concerns of the African child. It protects the right to education (art 11); the rights of handicapped children (art 13); the right of the child to health and health services (art 14); and the prohibition of child labour (art 15). For an analysis of the African Children's Charter, see D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157.

50 The Convention defines a refugee as 'every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'. Refugees often become poor in their new surroundings. Space does not allow us to delve into a detailed consideration of the ways in which these instruments address the claims of the poor in Africa. Suffice it to note, though, that their general ethic appears to be pro-poor.

tion of any norm whatsoever can be more accurately appreciated. This is why, as ultimately insufficient in the end as it is, the analysis of the jurisprudence of the African Commission in interpreting the African Charter in various contexts that is offered below is important.

4 African Commission and the adjudication of subaltern claims

The African Commission was until recently the main international institution charged with translating the African Charter's formal guarantees into individual and collective entitlements. Until the recent establishment of the African Human Rights Court, the African Commission shouldered that duty near-exclusively. In this part of the article we evaluate the jurisprudence of the Commission for its receptiveness to the claims of Africa's poor.

The African Commission's mandate to protect human rights is covered by articles 46-59 of the African Charter. Under this mandate, the Commission could accept both inter-state communications[51] as well as communications from individuals.[52] In its early years, the Commission dealt almost exclusively with civil and political rights. Even today, an audit of all of the communications that the Commission has dealt with from its inception to date would inevitably show that the vast majority of its decisions have been on communications alleging violations of civil and political rights.[53] This skewed record notwithstanding, the Commission has also pronounced substantively on economic and social rights. And, not surprisingly, its economic and social rights decisions contain reasoning that, if implemented, could provide healthy relief from poverty and deprivation for the applicants. This point is easily illustrated.

In *Free Legal Assistance Group and Others v Zaire*,[54] several communications against Zaire were consolidated into a single complaint. One of those communications was submitted by the Union Interafricaine des Droits de l'Homme which included allegations that the public finances of Zaire were mismanaged and that the government had failed to provide basic services. The complaint also alleged a shortage of medicines and the forced closure of universities and secondary schools for a period of two years. In its decision, the African Commission dwelt on articles 16 (the right to the best attainable state of physical and mental health) and 17 (the right to education) of the African Charter, among several others. It found Zaire to be in violation of these articles.

51 Arts 47-54.

52 Arts 55-59.

53 Nwobike (n 28 above) 130.

54 (2000) AHRLR 74 (ACHPR 1995).

According to the Commission, state parties to the African Charter should take necessary measures to protect the health of their people. It also held that the failure of the government to provide basic services, such as drinking water and electricity, and the shortage of medicines constituted a violation of article 16. Regarding article 17 on the right to education, the Commission held that it had been violated by the closure of universities and secondary schools.

Here, it is significant that the issue for determination partly concerned the failure of the state to ensure the provision of certain critically-important public goods (that is, healthcare, education, water, electricity, and such). It is also as important to our analysis here that the African Commission affirmed the duty of the state to take steps to ensure the provision of these public goods, and that it did so in terms that suggested that it did not – for the most part – subscribe to the TREMF paradigm that, *inter alia*, denies a significant redistributive role to the state, and calls upon it to denationalise, disinvest and deregulate national economies. As has been explained in section II of this article, this is a largely pro-poor posture.

Two years later, in the case of *Union Interafricaine des Droits de l'Homme and Others v Angola*,[55] the communication alleged the mass expulsion of West African nationals by the Angolan government. Those affected were said to have lost their belongings in the process. Though the complaint asserted that the Angolan government violated articles 12(4) and (5), prohibiting the expulsion or mass expulsion of non-nationals from any territory into which they had been legally admitted, in considering it, the African Commission coupled several social and economic rights. In finding a violation of articles 14 and 18 of the African Charter, the Commission held:

> This type of deportations calls into question a whole series of rights recognised and guaranteed in the Charter; such as the right to property (article 14), the right to work (article 15), the right to education (article 17(1)) and results in the violation by the state of its obligations under article 18(1) which stipulates that 'the family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical and moral health.' By deporting the victims, thus separating some of them from their families, the defendant state has violated and violates the letter of this text.

In 2008, the African Commission was again called upon to decide a mass expulsion case involving Angola, but in which the victims this time were 14 Gambian nationals resident and working in that country. In *Institute for Human Rights and Development in Africa v Angola*,[56] the complainants alleged that, even though they had proper documentation permitting them to live and work in Angola, they were all rounded up, detained and later deported without legal protection. The conditions of their detention prior to being expelled were unduly harsh, they

55 (2000) AHRLR 18 (ACHPR 1997).

56 (2008) AHRLR 43 (ACHPR 2008).

said. There was no medical attention, they had little or no food and lacked proper sanitation. According to them, 500 people were provided with just two buckets of water to use in the bathroom, which was in no way separated from the sleeping or eating areas. They also alleged that victims' personal property had been seized. These included television sets, shoes, wrist watches, clothing, generators, furniture and cash. They told the Commission that this was a violation of, among others, their rights to property and to work enshrined in the African Charter.

The African Commission found no justification for the action of the Angolan authorities. Though recognising that the right to property under the Charter was not absolute, it held that the respondent state provided no evidence to prove that its actions were necessitated by either a public need or community interest. 'Without such a justification and the provision of adequate compensation determined by an impartial tribunal of competent jurisdiction,' the Commission held that Angola's actions violated the complainants' right to property guaranteed by article 14 of the Charter. On their right to work under article 15 of the Charter, the Commission was of the opinion that the abrupt expulsion without any possibility of due process or recourse to national courts to challenge the respondent state's actions severely compromised the victims' right to continue working in Angola under equitable and satisfactory conditions.

A similar case to the above was that of *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea*.[57] The facts were that, following a speech delivered by the Guinean President, soldiers and civilians alike descended on Sierra Leonean refugees resident in that country, committing widespread looting and extortion. They evicted the refugees from their homes and refugee camps and confiscated their food and other personal property. In this complaint the Sierra Leoneans alleged the violation of among others their rights to be free from mass expulsions and not to be arbitrarily or unjustly deprived of their property. Recognising that mass expulsion presented a special threat to human rights, the African Commission found Guinea to have violated the enumerated rights.

With regard to the last three cases, although the African Commission's decisions can definitely be seen as pro-poor, especially given the way in which the Commission took sides with the poor and vulnerable parties in those cases against the much stronger governments involved, it should still be noted that their common major subject matter (the expulsions of immigrants) does not necessarily implicate the Baxian TREMF thesis. As such, there is little to say about these cases from the TREMF optic; except to note the fact that in some of these cases, the African Commission did affirm the responsibility of the state of Angola to provide medical attention and food to migrants while they were in

57 (2004) AHRLR 57 (ACHPR 2004).

detention preparatory to their expulsion. This can be read as a more marginal affirmation of the role of the state in providing public goods (in this case to a marginalised and vulnerable but small group in its custody), in which case the case would constitute a more marginal rejection of the TREMF paradigm's denial of a redistributive role for the state.

The case of *Malawi African Association and Others v Mauritania*[58] presented the African Commission with the opportunity to consider the rights of detainees to medical care as well as several other economic, social and cultural rights. The communication concerned the situation in Mauritania between 1986 and 1992. It alleged the existence of a practice in some parts of that country analogous to slavery. Some persons affected by this practice released documents calling for a dialogue with the government about how it could be ended. But rather than hearing out their plea, several of them were tried and imprisoned for holding unauthorised meetings, distributing materials injurious to the national interest and engaging in racial and ethnic propaganda. Among the rights relevant to this article that engaged the attention of the Commission were the right to property, the right to work, the right to cultural life and the right to health. On the right of detainees to health, the Commission held that a state's responsibility was far more evident because 'detention centres are its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities'.[59] The Commission found that some of the detainees died because of the lack of medical attention. They also lacked food, blankets and adequate hygiene. The Commission also held that a violation occurred when the government of Mauritania allowed the confiscation and looting of the property of black Mauritanians and the expropriation or destruction of their land and houses. In its judgment, it recommended that the Mauritanian government take appropriate measures to ensure payment of compensation to the widows and victims of the violations in question.

In terms of the relationship of this decision to the interests of the poor and/or the Baxian TREMF thesis, the decision is clearly a pro-poor one. It seeks to protect the rights of the sometimes enslaved, highly-marginalised and relatively impoverished black population in Mauritania. It is noteworthy here that, *inter alia*, rather than call on the government to disinvest from and deregulate the relevant areas of socio-economic life, the decision actually calls for more investment and regulation by the government in the prison sector so as to ensure the provision of the services and public goods that were denied to the detainees that filed this petition against the government at the African Commission. This move is clearly counter and not pro the TREMF paradigm.

58 (2000) AHRLR 149 (ACHPR 2000).

59 Para 122.

The particular health needs of mental health patients were central to the complaint in *Purohit and Another v The Gambia*.[60] It was presented on behalf of patients detained at Campama, a psychiatric unit of the Royal Victoria Hospital under the Gambian Mental Health Acts. The major issue raised by the complainants was that the law governing mental health in The Gambia was outdated. They also alleged overcrowding in that unit and that there was no requirement of consent to treatment or subsequent review of treatment. In its decision, the African Commission stated that the enjoyment of the human right to health was vital to all aspects of a person's life and well-being, and was crucial to the realisation of all other fundamental human rights. The Commission also expressed its awareness that millions of people in Africa were not enjoying the right to health maximally because African countries were generally faced with the problem of poverty which rendered them incapable of providing the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. With this in mind, the Commission decided to read into article 16 of the African Charter the obligation of state parties 'to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind'.[61]

Here, even while noting that most African governments were hampered as to the extent to which they could ensure the enjoyment of economic and social rights by the paucity of resources, the African Commission nevertheless insisted that these states must still take measures to the maximum of their available resources to ensure the enjoyment of these rights by their populations. Given that the failure to ensure that this is the case tends to much more negatively impact the poor than the elite/rich/powerful, and that the TREMF paradigm calls on the state to disinvest from the provision of social services, this decision can be commended as anti-TREMF and pro-poor.

Mauritanian-style slavery echoed in the case of *Rabah v Mauritania*.[62] The complainant and his family had been forcefully expelled from their ancestral home by a man claiming that the complainant's mother was his slave. As 'owner' of the slave, the said man claimed legal rights to the entire estate and property bequeathed to the complainant by his deceased mother. After exhausting all domestic remedies without much to show for it, the complainant brought the case before the African Commission. The Commission noted the persistence of slavery in Mauritania and its consequences. It held that

> to accept that someone, and a mother for that matter, can deprive her own children of their inheritance for the benefit of a third party, with no specific

60 (2003) AHRLR 96 (ACHPR 2003).

61 Para 84.

62 (2004) AHRLR 78 (ACHPR 2004).

> reason ... is not in conformity with the protection of the right to property (article 14 of the African Charter).

The Commission therefore found a violation of the complainant's rights. This decision is clearly pro-poor, not the least because it seeks to restrict the property 'rights', increase the transaction costs, and reduce the profits, of the local/global capitalists who profit immensely from slave (read 'free') labour in Mauritania, as elsewhere. The decision clearly favours the poor against local/global capital, and is thus much more in line with the UDHR paradigm than the TREMF one.

The right to property was again the bone of contention in *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire*.[63] The complainant in this case argued that paragraphs 1 and 2 of article 26 of Law 98-750 passed in December 1998 and regulating rural land ownership violated article 14 of the African Charter on the right to property. Apparently the law in question tied Ivoirian citizenship and qualification to aspire to certain political offices to rural land tenure in a manner that the complainant said was discriminatory. The Ivoirian government's response to this complaint was that the law affected only a few individuals and companies of which there was an insignificant African composition. The African Commission held that the argument of the Ivoirian government was irrelevant from a legal standpoint. The Commission reasoned that if Law 98-750 was allowed, it would give rise to the expropriation of property from a category of the Ivoirian population on the sole basis of their origin. Here again, because it basically seeks to remedy the attempt by a dominant group within Côte d'Ivoire to expropriate and thus appropriate the lands of a vulnerable and marginalised minority group, this decision can be read as pro-poor. It is in this sense that it is also an anti-TREMF decision.

While the African Commission has up to this moment shown a positive inclination towards such complaints as concerns the rights of the poor, its decision in the next case, however, leaves a sour taste in the mouth. In *Darfur Relief and Documentation Centre v Sudan*,[64] the victims all worked for an Iraqi oil company in the early 1980s as drivers, mechanics, electricians, cooks, servants and manual workers. They were arrested in 1983 at the outbreak of the first Gulf War between Iran and Iraq. They were taken to Iranian territory as civilian detainees. While in detention, the victims lost their sources of income and personal property. They did not have access to medical care and could not carry out religious rituals. However, the Iraqi government agreed to meet part of their unpaid salaries for the time that they were in Iranian custody. This money was transmitted through the Sudanese Ministry of Finance and Economic Planning. However, after disbursing the initial

63 (2008) AHRLR 62 (ACHPR 2008).

64 (2009) AHRLR 193 (ACHPR 2009).

instalment, the ministry first delayed paying the balance, then refused to pay altogether.

The complaint alleged the violation of several rights contained in the African Charter, including the right to property under article 14 and the right to health under article 16. The African Commission declared the complaint inadmissible on the grounds that the period of 29 months between the time when the High Court in Sudan dismissed the victims' case and their presentation of the complaint before it (the Commission) was unreasonable. The Commission relied heavily on the jurisprudence of the European Court of Human Rights and the Inter-American Commission on Human Rights to reach this verdict. In these systems, the threshold period of unreasonable delay is set at six months. We believe that in adopting these comparative practices under the circumstances, the African Commission should have been mindful of context and shown sensitivity to peculiar problems that may have impeded a timely presentation of the complaint. The Commission stated that it received no mitigating facts as to why the long delay had occurred. Yet it should have been guided by principles that would otherwise not have permitted a powerful government to keep resources belonging to poor citizens on a mere technical consideration. Thus, whatever its technical merits, this decision is, in our view, anti-poor.

The case of *Prince v South Africa*[65] is also remarkable as it is somewhat troubling from a pro-poor perspective. The complainant alleged that it was a violation of his rights to work and education when the Law Society of Cape of Good Hope denied the registration of his contract of community service. He had two previous convictions for possession of cannabis contrary to an existing law. However, the complainant claimed that his use of this substance is inspired by his Rastafarian religion in which reasoning and meditation are essential elements. The African Commission ruled that South Africa had a legitimate interest in restricting the use and possession of cannabis which trumped the complainant's right to occupational choice. According to the Commission:

> Although he [complainant] has the right to choose his occupational call, the Commission should not give him or anyone a leeway to bypass restrictions legitimately laid down for the interest of the whole society. There is no violation, thus, of his right to choose his occupation as he himself chose instead to disqualify himself from inclusion by choosing to confront the legitimate restrictions.

A careful reading of this decision shows that, even though the African Charter does not place any restrictions on the enjoyment of certain economic and social rights, the Commission would not hesitate to apply restrictions where a pressing societal interest is implicated.

Although this decision does not appear to directly implicate the TREMF paradigm, it may be criticised on the basis that it is difficult to

65 (2004) AHRLR 105 (ACHPR 2004).

see how it conduces to the amelioration of poverty in South Africa and elsewhere in Africa. While this decision's pro-law enforcement, anti-drugs, ethic and instincts are understandable, and while no human right is immune from clashing with other rights and therefore being liable to abridgement on occasion, the decision has the obvious effect of denying Mr Prince his ability to practise the profession he has been trained in, and as such denying him his ability to earn a living. It may also have a similar effect on similarly-situated persons on the African continent.

The next set of cases deal both with social and economic rights as well as those solidaritarian and development rights that have significance for the conditions of the poor in Africa. Not only do they contain possibilities for ameliorating individual factors of deprivation, but they also treat such possibilities in relation to the conditions of the poor as groups within particular states.

In *Bakweri Lands Claims Committee v Cameroon*,[66] the complaint was filed on behalf of the people of Bakweri in Cameroon against the Cameroonian government. In it, they claimed that the government had through a presidential decree listed the Cameroon Development Corporation (CDC) which would result in the alienation into private hands of several hectares of lands belonging to the Bakweri. The complaints alleged that if this were allowed to happen, the rights and interests which they exercised in two-thirds of their total land area would be extinguished. This, they claimed, constituted a violation of their rights to property and freedom to dispose of their wealth as enshrined in the African Charter. In addition, it was their claim that the concentration of private Bakweri lands in non-native hands undermined the Bakweri people's right to development and could aggravate social tensions. The African Commission declared the complaint inadmissible on the ground that domestic remedies had not been exhausted. As such, it is not possible to determine whether or not the view of the Commission in this case would have undermined or promoted the TREMF paradigm, and as such either harmed or protected the interests of the poor.

Similarly, in the case of *Gunme and Others v Cameroon*,[67] also concerning the right to development under the African Charter, the complainants alleged economic marginalisation by the Cameroonian government as well as a denial to them of economic infrastructure. They contended that their lack of infrastructure, and in particular the relocation of an important sea port from their region, constituted a violation of their right to development under article 22 of the African Charter. The Commission's decision, not all that surprisingly, privileged the discretion of state parties on the allocation of scarce economic resources. It held that the respondent state was 'under obligation to invest its

66 (2004) AHRLR 43 (ACHPR 2004).

67 (2009) AHRLR 9 (ACHPR 2009).

resources in the best way possible to attain the progressive realisation of the right to development'.[68] The Commission, while agreeing that 'this may not reach all parts of its territory to the satisfaction of all individuals and peoples, hence generating grievances',[69] still concluded that this alone could not be a basis to find a violation of article 22. In other words, the Commission placed the right to development within the context of 'progressive realisation', a limitation more popular with economic, social and cultural rights in other international instruments but not under the African Charter.

Here, even as it ultimately decided against the petitioners who filed this particular matter, the African Commission still affirmed the significant role that African states must play in the development process of African societies. For example, its sense that the African state must 'invest its resources in the best way possible' in order to spread development 'progressively' around the relevant country is hardly a nod in favour of the TREMF paradigm's denial of a redistributive role for the state. It is in fact an affirmation, however modestly, of the state's redistributive role.

Even more remarkably, the decision of the African Commission in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*[70] is perhaps one of the most directly anti-TREMF and pro-poor decisions that that regional human rights body has ever reached. In that matter, the case against Nigeria was that it had condoned the activities of the state-owned Nigerian National Petroleum Corporation (NNPC) and Shell Petroleum Development Corporation in which the NNPC held a majority equity stake over oil exploitation in Ogoniland. The Ogonis are a small minority ethnic group in Nigeria and it was alleged that the exploitation activities had been carried out without due regard to the environment and health of the Ogoni community. In addition, toxic waste was allegedly deposited into the local environment without proper efforts to ensure they did not affect the surrounding villages. With both air and water severely contaminated, long and short-term health conditions ravaged the communities, including skin infections, gastro-intestinal and respiratory ailments and increased risk of cancer. The complaint alleged a violation of the rights to property, health and family life. It also alleged that the right of the Ogonis to freely dispose of their wealth and natural resources was compromised as well as their right to a general satisfactory environment.

The African Commission found Nigeria liable for those violations and called upon its government to ensure the payment of adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government-sponsored raids. It also called on the government to undertake a comprehensive clean-up

68 *Gunme* (n 67 above) para 206.

69 *Gunme* (n 67 above).

70 (2001) AHRLR 60 (ACHPR 2001).

of lands and rivers damaged by oil operations and to ensure that appropriate environmental and social impact assessments are prepared for any future oil development. The Commission urged Nigeria to ensure that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry and to provide information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

Clearly, the decision sides with the largely poor Ogoni population against the property interests of global and local capital as represented by Shell, powerful international investors, the NNPC, the Nigerian government, and many of the powerful rich/elite Nigerians that have formal or informal (but nevertheless hugely profitable) stakes in the Nigerian oil industry. And not only does the decision affirm the rights of the poor to a number of economic and social and solidaritarian rights, but the African Commission went out of its way to 'read in' two such rights into the African Charter, rights which were hitherto not explicitly guaranteed within the African system. This decision is anti-TREMF and pro-poor *par excellence*.

A similarly impressive and salutary decision was reached by the African Commission on the application of article 22 of the African Charter, on the right to development, in *Centre for Minority Rights Development and Others v Kenya* (*Endorois* case).[71] This case is quite remarkable since it was the first complaint of its kind where the African Commission found that article 22 of the African Charter had been violated. The main grievance of the Endorois community was that Kenyan authorities ignored them in a development process that had a pervasive impact on them. Specifically, they claimed first that they had not been consulted before a major developmental project that impacted their lifestyle was embarked upon. Second, they were denied compensation for the adverse consequences of that project on their lifestyle. The project in question was the conversion of the Lake Bogoria land on which the pastoral Endorois community grazed livestock as well as performed religious ceremonies into government game reserves.

In its decision, the Commission placed the burden of 'creating conditions favourable to a people's development'[72] on the government of each African state. It held that it is not the responsibility of the Endorois community to find alternative places to graze their cattle or partake in religious ceremonies. Continuing, it held:[73]

> The respondent state [Kenya] ... is obligated to ensure that the Endorois are not left out of the development process or [its] benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the respondent

71 (2009) AHRLR 75 (ACHPR 2009).

72 *Endorois* case (n 71 above) para 298.

73 *Endorois* case (n 71 above) (Commission's emphasis).

> state did not adequately provide for the Endorois in the development process. It finds against the respondent state that the Endorois community has suffered a violation of article 22 of the Charter.

There is much to commend in the position of the Commission in this case. In addition to its satisfactory decision on behalf of the Endorois community, the Commission quite significantly developed what it describes as a two-part test for the right to development. It held that the right enshrined in article 22 of the African Charter 'is both constitutive and instrumental,[74] or useful as both a means and an end'.[75] According to the Commission:[76]

> A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the complainants' arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.

Here again, there can be little reasonable argument as to the anti-TREMF and pro-poor character and quality of this already much-celebrated decision. It seeks to protect the property interests of a relatively poor population in Kenya, to bolster their capacity to resist their dispossession by both the government and global/local capital, and to aid them in their struggle to control their own economic affairs and uplift their socio-economic conditions. And against the TREMF paradigm's denial of a redistributive role to the state, it affirms in fairly robust fashion the central and *active* role that the state must play in 'creating the conditions favourable to a peoples' development' and in providing alternative grazing grounds (property) to the Endorois community.

From the foregoing analysis of its economic and social rights jurisprudence, it is undeniable that the African Commission has, in general, shown appreciable sensitivity to the claims of Africa's poor. Importantly, for our purposes in this article, it is crystal clear from this analysis that the Commission's reasoning in the relevant cases has generally undermined rather than affirmed the emergent TREMF human rights paradigm that, as Baxi has argued, has tended to function in ways that produce and/or accentuate poverty.

5 Conclusion

The main goal of the article was to assess the extent to which the norms and jurisprudence of the African system have been pro-poor. The study was limited by its explicitly-justified focus (i) on the African Charter

74 Commission's emphasis.

75 *Endorois* case (n 71 above) para 277.

76 *Endorois* case (n 71 above).

and the African Commission to the exclusion of the African Court of Human and Peoples' Rights; and (ii) on the economic and social rights norms and jurisprudence of the African system (the type of human rights norms that are most directly and immediately connected to the amelioration of poverty in most parts of the African continent) to the exclusion of the civil and political rights norms and jurisprudence of that system. Following a definition of the conception of poverty that frames this particular study as in essence a 'serious lack of basic needs', the nature of the conceptual framework of the analysis that was conducted in the article, which was in the main provided by Baxi's theory on the emergence of a trade-related market-friendly human rights paradigm, was explained. Thereafter, the relevant norms and jurisprudence of the African system were analysed and conclusions reached as to the extent to which they were anti-TREMF and pro-poor, or pro-TREMF and anti-poor. The conclusion that was reached was that, on the whole, the analysed norms and jurisprudence of the African system have tended to be animated by an anti-TREMF (and pro-UDH paradigm) sensibility, ethic and politics, and have for this and other reasons been more or less pro-poor in orientation.

While these findings show that the TREMF paradigm has not completely eaten away at the pro-poorness of the textual affirmations of human rights that guide, and have been produced, by such international human rights systems and, although such texts are important enough in 'loosely' framing and shaping human rights that their character must be carefully studied, it must still be cautioned that such textual affirmations of rights are not self-executing. They must, as we all know, be implemented in a really concrete sense by governments, peoples, corporations, institutions and other agents for them to really matter to the average person. It should therefore be kept in mind that it is at this level, that is, the level of the 'living' human rights law (or the law as it is actually experienced by ordinary people) that the TREMF paradigm's ultimate impact is to be observed. This suggests that the TREMF paradigm may have exerted more influence in the actual/living world that lies beyond texts and textual interpretation than this study (focused as it almost completely is on 'the text') might suggest.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Customary communities as 'peoples' and their customary tenure as 'culture': What we can do with the *Endorois* decision

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Summary

The peoples' rights protected in the African Charter, and in particular the right to culture, development, natural resources and the emphasis on community self-determination and self-identification, potentially provide the basis for creative jurisprudence to protect rural communities and promote their participation in decision making and benefit from the development of their land. In the Endorois *decision, the African Commission could have relied on domestic African jurisprudence to give new content to the participation rights of all rural communities living under customary law, and not just those that can prove their own indigeneity. The article deals with the notion of self-defining customary communities in Africa and the jurisprudence of the South African Constitutional Court on living customary law, being varying, localised systems of law observed by numerous communities. The African Charter does not explicitly recognise customary law, but the award of title in the case of the Endorois, the evidence of customary forms of tenure and the centrality of land and associated practices in the culture of the people, amount to such recognition. The article concludes with a note on the procedural aspect of participation*

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in decision making. The consent standard for any limitation on the right to property, culture and development reflects respect for and recognition of customary law and culture. The customary law tenure rules of communities require community permission before outsiders could use and share in the community's property and resources.

1 Introduction

Ten years ago, Alston[1] wrote that 'there is no reason to expect that the African Charter on Human and Peoples' Rights (African Charter) will prove in the years ahead to be a force for the progressive development of peoples' rights, despite the occasional invocation of the concept for rhetorical purposes'. Two years later, the African Commission on Human and Peoples' Rights (African Commission), the institution mandated with giving content to the rights contained in the African Charter, took a bold step in proving Alston's pessimism wrong by recognising the Ogoni people of Nigeria as a 'people' in terms of the Charter and protecting their rights in this capacity.[2] This prompted Murray and Wheatley to argue that the African Commission has taken peoples' rights beyond mere 'aspirational' and 'exhortatory' tools of rhetoric, to being the subject of legal claims before the Commission.[3]

In the communication brought by the Endorois community against the Kenyan government, the African Commission found the Endorois community to constitute a 'people' and, as such, recognised the violation of its rights to property, culture, development, free disposal of resources and religion.[4]

The question we pose is whether the *Endorois* decision opens the door for customary communities[5] to also seek recognition of their customary rights in communal land and other resources and, importantly, whether they can use the African Charter to protect their tenure rights and enforce their right to participate in any decision involving the use of their land by mining companies and other extractive industries. We argue that this is a crucial and urgent potential role for the

1 P Alston 'Peoples' rights: Their rise and fall' in P Alston (ed) *Peoples' rights* (2001) 259 287, quoted in R Murray & S Wheatley 'Groups and the African Charter on Human and Peoples' Rights' (2003) 25 *Human Rights Quarterly* 236.

2 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

3 Murray & Wheatly (n 1 above) 226.

4 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case).

5 The terms 'customary', as 'traditional', and 'indigenous' are contentious. We use the term 'customary community' in the article to refer to communities who regulate their lives, and in particular their tenure rights, in terms of customary law. This term is used to denote a far broader group of people than the narrow definition of 'indigenous' or 'tribal' peoples, a distinction that will become clear later in the article.

Charter and the Commission because few, if any, African domestic courts have protected customary tenure rights effectively. If the African Charter continues to protect the rights of individuals and indigenous communities only, the majority of the continent (living on communal land under customary law) will remain onlookers of the human rights discourse in Africa.

At this stage, a qualification is in order: We write as practitioners rather than academics, and therefore declare our interest. We are deliberately promoting a purposive interpretation of the *Endorois* decision that provides room for the recognition of African customary tenure rights[6] beyond the rights ascribed to indigenous peoples by certain international law instruments.[7]

We are not advocating for the re-drawing of the African map in order to recreate some pre-colonial ideal; rather, we are attempting to assert the rights of customary African communities who live on land still effectively regarded as *terra nullius*.

We proceed to analyse how the African Commission reached its decision to recognise the title claim of the Endorois community with particular reference to their choice of authorities and their use of international instruments and precedents relating to indigenous peoples' rights.

In the next section, we address the situation of customary communities in Africa. We briefly outline the history that has led to the current predicament of rural communities in that their customary forms of land tenure receive scant formal legal recognition in domestic African courts.

2 Customary communities in Africa: What we do not see does not bother us

2.1 Customary law and the colonial imposition

The renowned scholar of customary law and related systems of tenure, the late Professor Okoth-Ogendo, recounted how, as the colonial era drew to a close in the 1950s and 1960s, British legal scholars organised a series of conferences to discuss the 'future' of customary law in Africa

6 We understand the term 'customary tenure rights' to include the informal rights exercised although not registered or formally acknowledged by the state law system. It may include original ownership or aboriginal title rights where such have not been explicitly extinguished by state law.

7 ILO Resolution 169; C169 Indigenous and Tribal Peoples Convention, 1989 Convention concerning Indigenous and Tribal Peoples in Independent Countries; 1 September 2011, Human Rights Council: Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories.

and the need to 'construct a framework for the development of legal systems in the emerging states'.[8] These initiatives assumed that the 'indigenous' legal systems of African countries and peoples of which they were well aware, were inadequate and inferior compared to the English common law.

These scholars must have felt vindicated when, upon independence, most African countries adopted the colonial legal framework wholesale – especially, as Okoth-Ogendo points out, in view of the development framework's 'general ambivalence as regards the applicability of indigenous law'.[9] Indigenous law and customary legal systems were regarded as inferior, were never extended to areas covered by colonial laws and, when applied, it was done only to the extent that they were not repugnant to Western justice and morality or inconsistent with any written law.

It is trite that the post-colonial era relegated customary law to a separate and unequal system of law that rarely found its way into the formal, 'Western' courts. In an attempt to gain some legitimacy and to give a measure of status to the separate systems, customary courts were created. Bennett argues that these courts were 'intended not only to settle disputes but also to proclaim the reach of government and the values of Western civilisation'.[10]

However, the impact on customary law systems went further. Under colonial rule, the foreign powers gradually realised that they could utilise customary institutions of governance to achieve the subjugation of local communities. Traditional leaders who were open to co-operating with the colonial powers (often for compensation) were supported: Legislation was passed to ensure that the powers of the favoured leaders were entrenched.[11] These statutes were based on a distorted colonial understanding of custom skewed to benefit colonial interests.[12]

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8 HWO Okoth-Ogendo 'The nature of land rights under indigenous law in Africa' in A Claassens & B Cousins (eds) *Land, power and custom* (2008) 95.

9 Okoth-Ogendo (n 8 above) 99.

10 T Bennett *A sourcebook of African customary law of Southern Africa* (1991).

11 Eg, in South Africa, the Bantu Authorities Act of 1951 entrenched 'tribal' boundaries and gave statutory powers to certain chiefs. See also P Delius 'Contested terrain: Land rights and chiefly power in historical perspective' in Claassens & Cousins (n 8 above) 211. Chiefs were recognised and incorporated as the lowest rung of the administrative system. The Native Administration Act 38 of 1927 set out to define a distinct administrative and legal domain for Africans drawing on a highly authoritarian understanding of chiefly rule as a model. Echoing the Natal system, the Act opened with the declaration that the 'Governor General shall be the supreme chief of all the natives in the provinces of Natal, Transvaal and the Orange Free state'. This supreme chief was given a range of powers to which even the most powerful ruler in pre-colonial South Africa could never have aspired, and it permitted him to devolve these vast powers to any administrative official. It also bestowed on the supreme chief the right to rule over all Africans by the simple device of issuing proclamations. Under the Act, the Governor-General could recognise or appoint any person as a chief or a headman in charge of a tribe or location, could depose any chief or headman and was authorised to define their powers, duties and privileges.

12 For more, see Claassens & Cousins (n 8 above).

When these legislative frameworks were entrenched in post-independent states, the colonial distortions of customs were also entrenched. As a result, customary governance systems and community rules were overruled by statutes regulating traditional leadership and, in some cases, communal tenure.

Mnisi[13] describes two possible outcomes of the imposition of inappropriate legislation upon customary communities. On the one hand, the fixed, hierarchical system of state law that is intolerant to negotiated rules sometimes stifles communities' customary law into obscurity. On the other hand, the irreconcilability between the two systems often leads to a complete lack of local engagement with state law beyond the strictly formal, with communities choosing to ignore the state's 'rules' as far as possible. It is the latter phenomenon that is most prevalent in Africa.

As a result, not only was customary law – insofar as it was recognised – relegated to an inferior legal system in terms of the 'official' legal framework, but the imposition of inappropriate statutes upon customary communities forced most of these communities to ignore these statutes as far as possible and continue regulating their lives in terms of their custom. Customary law systems thus developed in spheres invisible to the dominant legal system, but these informal systems remained central to the lives of most of their subjects.

The post-colonial entrenchment of the colonial *status quo* retained this divide. Little effort was made to reinstate customary law as an equal to the imposed colonial legal framework.[14]

Towards the end of the twentieth century, many African countries adopted constitutions which in many cases recognise customary law as an equal source of law to be applied by the courts 'where appropriate'. However, the application of customary law in the formal courts remains almost exclusively limited to issues of personal law, and rights claimed by individuals.

The Food and Agriculture Organisation (FAO),[15] as other international organisations, asserts that 'protecting and enforcing the land claims of rural Africans may be best done by passing laws that elevate existing customary land claims up into nations' formal legal frameworks and make customary land rights equal in weight and validity to documented land claims.' This statement ignores the fact that these claims

13 S Mnisi '[Post]-colonial culture and its influence on the South African legal system – Exploring the relationship between living customary law and state law' unpublished PhD thesis, Oxford University, 2007.

14 For commentary on this post-independence phenomenon in South Africa, see Claassens & Cousins (n 8 above) and A Claassens 'The resurgence of tribal levies in the context of recent traditional leadership laws in South Africa' paper delivered at Wits University School of Historical Studies conference 'Let's talk about the Bantustans' (2010).

15 RS Knight 'Statutory recognition of customary land rights in Africa: An investigation into best practices for lawmaking and implementation' (2010) vi.

should, in any event, have equal weight and validity where custom is recognised as a source of law. The reason why communities are not protected, we contend, has more to do with the parallel nature of African legal systems and the inability of domestic courts to engage with customary forms of tenure. In addition, codifying customary forms of tenure in terms of common law rights will arguably once more create a parallel system with 'legal' rights on paper and unrecognised customary rights in practice. Rather, we argue, customary rights should be recognised on their own terms, and measured according to standards set by their own systems.[16]

It is trite that African customary law is a community-based system of law in which rights are generally relational and not held by individuals as atomistic beings, but as members of a group and relational to the other members.[17] To restrict the protection of customary law to individual rights, therefore, denies members of customary communities the ability to assert their tenure rights outside the sphere of their own communities and their internal, customary dispute resolution mechanisms.

Customary systems are not based strictly on rules associated with the mainstream understanding of common law. In all societies there are discrepancies between the 'rules' people describe and the actual practices in which they engage. This discrepancy is particularly pertinent with regard to customary law systems. While underlying values and commonalities can be identified in customary practices, rules are not treated as a fixed structure that regulate societal organisation with some occasional leeway for exceptions. Rather than blindly referring to rules in making a decision, the current reality of every situation is considered and the rule tested against the customary values.[18] Customary systems are thus outcomes-based rather than rule-based. Once custom is codified, it loses this ability to adapt contextually.[19]

To make matters worse, Africa has seen decades of efforts from international institutions (notably the World Bank and more recently some documents emanating from the FAO) to promote individual titling and land registries in Africa. These efforts formed an integral part of the

16 There are other reasons for advancing this argument which extend beyond the focus of this article. See W Wicomb 'Law as a complex system: Facilitating meaningful engagement between state law and living customary law' paper presented at the IASC International Conference on the Complex Commons, Hyderabad, India, January 2011.

17 See eg B Cousins 'Characterising "communal tenure": Nested systems and flexible boundaries' in Claassens & Cousins (n 8 above) 119.

18 See JL Comaroff & S Roberts *Rules and processes: The cultural logic of dispute in an African context* (1981).

19 This feature presents interesting comparisons with international law: It could be argued that a human rights document such as the African Charter is also designed to anticipate outcomes-based interpretations in order to effectively protect the rights of people.

so-called structural adjustment programmes as the World Bank recommended formal titling as a precondition for the modernisation of agriculture and promoted the abandonment of communal/collective tenure as less compatible with a market-based system.[20] As we will see, the uneven outcomes of these programmes has been the cause of an about-turn in various regional policy and soft law instruments on the continent now calling for the recognition of customary law systems of tenure.

Unfortunately, these efforts will remain of little use, we argue, if formal courts do not find a way to accommodate and adjudicate customary systems of tenure – not as versions of common law ownership, but on their own terms.[21]

In the following section, we briefly discuss why this has become an urgent challenge for the customary communities of Africa.

2.2 Customary land tenure and the problem of recognition

In a recent study by the FAO on the statutory recognition of customary land rights in Africa, Knight[22] writes:

> The issue of how best to increase the land tenure security of the poor and protect the land holdings of rural communities has been brought to the fore in Africa due to increasing land scarcity caused by population growth, environmental degradation, changing climate conditions, and violent conflict. This scarcity is being exacerbated by wealthy nations and private investors who are increasingly seeking to acquire large tracts of land in Africa for agro-industrial enterprises and forestry and mineral exploitation, among other uses. Some nations have received (informal) requests for up to half of their cultivatable land areas, and others are granting hundreds of thousands of hectares to private investors and sovereign nations.

These thousands of hectares are most likely not unoccupied, but rather land being held in terms of customary law by rural communities. These communities are unable to assert their customary tenure rights against their governments or any other external entity simply because they

20 J Quan 'Land tenure, economic growth and poverty in sub-Saharan Africa' in C Toulmin & J Quan (eds) *Evolving land rights, policy and tenure in Africa* (2000) 31.

21 Elsewhere we have argued that the interrelation and interaction between the state law and customary law systems depend on the recognition of both the *identity* and *difference* of the two systems. In the latter case, the fundamental differences between the two systems will only be acknowledged properly if they are not understood in terms of the other, but in their difference – thus, avoiding the trap of formulating customary law in terms of state/conventional private property law, thereby distorting the nature of the former (or, indeed, *vice versa*). At the same time, however, we must be able to acknowledge the identity or similarities of the systems in order to facilitate engagement. An over-emphasis on difference has an equally impotent result: In a rural community, eg, where living customary law is at the order of the day, state law is often so foreign to their particular social and cultural contexts that it is simply ignored. See H Smith & W Wicomb 'Towards customary legal empowerment' paper presented at SAIFAC Conference on Transjudicialism, Constitutional Court, 4 October 2010.

22 Knight (n 15 above) v.

cannot assert their rights in courts that know, understand and apply common law ownership only. The relegation of customary law – and, as a result, customary communities – to the invisible, thus continues domestically.

The human rights discourse that first entered African domestic legal systems by way of the continent-wide ratification of the African Charter and later by its inclusion in African constitutions is only relevant where it can be applied. This is evident from the fact that the rare encounters between the rights- and custom-based discourses have largely been in personal law cases before the formal courts where in some instances rights were found to trump custom.[23]

The human rights discourse cannot reach as far as community-based rights as long as these rights never reach formal courts. For the majority of rural Africans, therefore, the African Charter, their countries' constitutions and human rights in general remain foreign concepts of a system of law parallel and irrelevant to their lives.

3 South African Constitutional Court's engagement with customary forms of ownership

One of the few African countries where domestic courts have been forced to engage with customary forms of tenure is South Africa. In terms of section 211(3) of the South African Constitution, the courts are obliged to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law.[24] In doing so, the courts must have regard to the spirit, purport and objects of the Bill of Rights. The Constitution[25] declares that

> [t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights].

23 See eg *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others* 2005 1 SA 580 (CC); *Ephrahim v Pastory and Kaizingele* [1990] LRC (Const) 757 (HC of Tanzania). The handful community-based claims to property in Tanzania and Kenya have seen communities rely on the protection of indigenous peoples' rights, with limited success. See *Kemai & Others v Attorney-General & Others* (2005) AHRLR 118 (KeHC 2000); *Sesana & Others v Attorney-General* (2006) AHRLR 183 (BwHC 2006).

24 Customary law has been recognised as a source of South African law by the Constitutional Court in a number of cases. See *S v Makwanyane & Another* 1995 3 SA 391 (CC) paras 307-308; *Bhe* (n 23 above) para 45; *Gumede v President of the Republic of South Africa & Others* 2009 3 SA 152 (CC) para 20; *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 460 (CC) para 52; *Shilubana & Others v Nwamitwa* 2009 2 SA 66 (CC) para 45; *Tongoane & Others v Minister for Agriculture and Land Affairs & Others* [2010] ZACC 10; 2010 6 SA 214; 2010 8 BCLR 741 (CC).

25 Sec 39(3).

Section 39(2) of the Constitution envisages the development of customary and common law whilst promoting the Bill of Rights.[26]

To its credit – and perhaps due to its very recent past of racial segregation and discrimination – the South African Constitutional Court has placed great emphasis on the dangers of understanding custom in terms of that which was codified by the colonial powers or, indeed understanding customary forms of tenure in terms of familiar common law principles. As a result, the court has come to distinguish between 'living' and 'official' customary law and notes that it is the former that is recognised by the Constitution rather than the statutory entrenchments of custom.[27]

Living customary law refers to customary law that is 'actually observed by the people who created it', as opposed to ''official' customary law that is the body of rules created by the state and legal profession.[28] Living customary law is a 'manifestation of customary law that is observed by rural communities, attested to by parol. Although the term 'living customary law' gives the impression of a singular, unified legal system being the referent, this term actually points to a conglomerate of varying, localised systems of law observed by numerous communities.[29]

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26 Sec 39(2) provides: 'When developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' Sec 8(3) requires that, in the horizontal application of the Bill of Rights affecting natural and juristic persons, the court must apply or develop the common law to give effect to the relevant right to the extent that statute law does not address the matter. Sec 173 refers to the inherent power of the higher courts to develop the common law. We would argue that the development of both customary law and the common law is implied in the wording of secs 8 and 173. See also DM Davis & K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *South African Journal on Human Rights* 403 fn 76. Further, sec 39(2) should be interpreted to require that whenever any court or even customary law dispute resolution mechanism, such as a community or 'tribal court', engages with, interprets, applies or develops customary law, it must implement and promote the rights in the Bill of Rights. It requires more than merely taking into account the political, social and economic human rights contained in the Constitution. See also Davis & Klare (above) 425-431.

27 This principle does give rise to problems of proving custom. However, the Court has developed a number of principles in this regard. It held in *Shilubana* (n 24 above): 'An enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community. Such a consideration also focuses the enquiry on customary law in its own setting rather than in terms of the common law paradigm, in line with the approach set out in *Bhe*. Equally, as this court noted in *Richtersveld*, courts embarking on this leg of the enquiry must be cautious of historical records, because of the distorting tendency of older authorities to view customary law through legal conceptions foreign to it.'

28 Bennett (n 10 above) 138.

29 Mnisi (n 13 above). In *Alexkor* (n 24 above), the Court noted: 'Bennett points out that, although customary law is supposed to develop spontaneously in a given rural community, during the colonial and apartheid era it became alienated from its community origins. The result was that the term 'customary law' emerged with three quite different meanings: the official body of law employed in the courts and by the administration (which, he points out, diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually

The seminal case with regard to customary forms of tenure is that of the Richtersveld community which reached the Constitutional Court in 2003. In recognising the aboriginal title of the Richtersveld community, the Court held that[30]

> [t]he real character of the title that the Richtersveld community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the community. The community had the right to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld community had a right of ownership in the subject land under indigenous law.

The Court bases its approach on a finding by the Supreme Court of Appeal[31] according to which the mainstay of the community's culture was its customary land tenure laws and rules. The Court then interprets the finding of the lower court in language reminiscent of the Commonwealth authorities on aboriginal title that similarly defer to the origin of the right and the regime in traditional laws, custom and culture (as discussed below).

Finally, it relies on the principle stated as early as 1922 by the Privy Council in *Amodu Tijani*:[32]

> The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title ... To ascertain how ... this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.

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lived by the people.'

30 *Alexkor Ltd and the Republic of South Africa v The Richtersveld Community & Others* (CCT19/03) [2003] ZACC 18; 2004 5 SA 460 (CC); 2003 12 BCLR 1301 (CC) (14 October 2003) para 62. The court's preference for the term 'indigenous' law rather than 'customary' law appears to be based on the use of 'indigenous' in schedule 4 of the Constitution.

31 *Richtersveld Community & Others v Alexkor Ltd & Another* 2003 6 BCLR 583 (SCA) para 18: 'The Richtersveld people shared the same culture, including the same language, religion, social and political structures, customs and lifestyle derived from their Khoi-Nama forefathers. One of the components of the culture of the Richtersveld people was the customary rules relating to their entitlement to and use and occupation of their land. The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources.'

32 *Amodu Tijani v The Secretary, Southern Nigeria* (100) (1921) 2 AC 199 403-404. The case involved a claim for compensation by an African chief for lands taken by the Crown for public purposes under a local ordinance in Southern Nigeria, a colony acquired by the cession of Lagos in 1861. In issue was the amount of compensation to be paid, which depended on the nature of the appellant's interest in the lands and his relationship with the community that had occupied and used it. Viscount Haldane dealt with the nature of the land tenure under local customary law and the effect of the cession.

In its *Tongoane* judgment of 2010,[33] the Constitutional Court insisted on the important principle that customary law systems are not invisible, but systems of law equal to statutory and common law. The case was brought by four rural communities who challenged the Communal Land Rights Act (CLARA) of 2004, the legislation created to 'codify' communal forms of tenure in the former homelands of South Africa.

The Court held that 'the presence of living customary law as a form of regulation on the ground is not equivalent to a legal vacuum. It is rather a genuine presence that must be treated with due respect, even if it is to be interfered with.' The 'field ... not unoccupied' with 'living indigenous law as it evolved over time' includes all communal land in South Africa:[34]

> Originally, before colonisation and the advent of apartheid, this land was occupied and administered in accordance with living indigenous law as it evolved over time. Communal land and indigenous law are therefore so closely intertwined that it is almost impossible to deal with one without dealing with the other.

If it is the case that one cannot deal with communal land without dealing with indigenous or customary law, then the only avenue for the African regional human rights system to protect the communally-held rights of peoples in Africa is through proper engagement with customary law. In the following section, we investigate the extent to which the African Charter recognises customary law before turning to the significant recent African Commission decision in the matter of the Endorois community of Kenya.

4 African Charter and recognition of customary law

There is no explicit recognition of customary law in the African Charter.[35] However, it has been acknowledged that the Charter was designed to speak to the unique circumstances and needs of the African continent and its people.[36]

The most significant and explicit feature of the African Charter in this regard, and one that certainly seems to indicate an acknowledgment of the communal nature of rights in Africa, is the protection of the rights of 'peoples' in the Charter.[37] The interpretation of this inclusion as a nod in the direction of customary legal system is strengthened by the

33 *Tongoane* (n 24 above).

34 *Tongoane* (n 24 above) para 45.

35 The African Charter on Human and Peoples' Rights, also called the 'Banjul Charter', was adopted on 27 June 1981 and came into force on 21 October 1986. It has been ratified by all African countries except Morocco.

36 Murray & Wheatley (n 1 above) 213-216.

37 *Endorois* (n 4 above) paras 19-24.

inclusion of duties alongside rights in the Charter. This has led some analysts to argue shortly after the adoption of the Charter that it[38]

> makes it clear that the rights of an individual are bound up with and thus are only realised within the context of the community in which those rights are not restricted, but rather protected. It 'places individual human rights in the contextual setting of peoples' rights, with due respect for the human person as the central subject of development.

It is perhaps not surprising, however, that these analyses were propounded at the very beginning of the African Commission's mandate of interpreting the African Charter in terms of article 45(3). Given the last 25 years of jurisprudence of the Commission, this interpretation has been eroded seriously. Not only did it take the Commission years to give content to the term 'peoples', but it has shown very little indication that it aims to protect communally-held rights. It was only in the famous *SERAC* decision,[39] handed down in 1996, where the Commission boldly recognised the Ogoni people – as a section of a population – as a 'people'. It has since also referred to an entire nation as well as an indigenous community as a 'people'.[40]

In this context, it is interesting to relate the comments of the Commission in the *Endorois* decision on its delay in giving content to the term 'peoples'.[41]

> Despite its mandate to interpret all provisions of the African Charter as per article 45(3), the African Commission initially shied away from interpreting the concept of 'peoples'. The African Charter itself does not define the concept. Initially the African Commission did not feel at ease in developing rights where there was little concrete international jurisprudence. The ICCPR and the ICESCR do not define 'peoples'.

This comment seems odd and even disappointing in view of the fact that the African Charter – by the African Commission's own admission – aims to speak to the unique needs of Africa and therefore it should refrain from modelling itself on international jurisprudence exclusively. Indeed, the Commission goes on to say that[42]

> normatively, the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of 'peoples'. It substantially departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes the three generations of rights ...

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38 Murray & Wheatley (n 1 above), citing R Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80 82 and E Bello 'The African Charter on Human and Peoples' Rights' (1985-86) 194 *Hague Recueil* 13 24.

39 *SERAC* (n 2 above).

40 Murray & Wheatley (n 1 above) 231.

41 *Endorois* (n 4 above) para 147.

42 *Endorois* (n 4 above) para 149.

If this is the case, the African Commission should be brave in giving content to these innovative provisions without impoverishing the African Charter by falling back on inappropriate international jurisprudence operating within a context where 'indigenous' or 'tribal' people are absolute minorities, recognised by international law and therefore can exist despite a measure of exclusion from the dominant legal system..

In fact, it could even be argued that the African Commission should rather rely on the jurisprudence of domestic African courts that do battle with the difficulties of uniquely African problems of legal pluralism as was shown in the previous section. As we will see, the Commission had a great opportunity to do just that in the *Endorois* decision, but unfortunately relied on the accepted wisdoms of other regional systems.

This development in the African Commission's jurisprudence seems out of step with the African Charter itself. Articles 60 and 61 of the Charter empowers the Commission to 'draw inspiration from international law on human rights', but in particular from 'the provisions of various African instruments on human and peoples' rights'. While the instruments referred to are not specified, the principle of resorting to African instruments in preference of international human rights instruments is clear.

Article 61, relating to subsidiary means of interpretation, reflects the emphasis on the African context even stronger. It reads:[43]

> The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or specialised international conventions laying down rules expressly recognised by member states of the (then) Organisation of African unity, African practices consistent with international norms on human and peoples' rights, *customs generally accepted as law, general principles of law recognised by African states, as well as legal precedents and doctrine*.

This article could be read to include both local customary law systems and African domestic jurisprudence as sources to be considered by the African Commission – especially, we would argue, when uniquely African issues are at stake.

This interpretation was supported by the Preamble to the Commission's Draft principles and guidelines to the interpretation of socio-economic rights in the Charter[44] which stated that the Commission draws 'inspiration from domestic courts within the jurisdiction of states parties to the African Charter'.

However, the same document did reveal a narrow, common law-inspired understanding of the property clause contained in the Charter. Article 14 reads:

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43 Our emphasis.

44 This document was released for comment in 2008 by the African Commission and has not been adopted as of June 2011.

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

In its comments on the article, the draft principles and guidelines failed to even mention communal property and customary forms of tenure – despite the fact that more than 60 per cent of land in Africa is held in this way.

On other fronts, however, the tide is slowly turning. International and regional human rights institutions are increasingly moving towards the idea that proper recognition of customary law tenure systems may be a solution to Africa's problems of poverty and unequal resource distribution – and indeed to realise the right to land. An emphasis on customary principles is also found in many international, regional and sub-regional soft law documents promoting sustainability.

Significantly, in its recent Framework and Guidelines on Land Policy in Africa, the African Union Commission, the African Development Bank and the United Nations (UN) Economic Commission for Africa encouraged countries to 'acknowledge the legitimacy of indigenous land rights' and 'recognise the role of local and community-based land administration/management institutions and structures, alongside those of the state'. Unfortunately, a closer analysis of the document reveals a complete lack of understanding of what the recognition of customary law systems as equal to the state law system would entail, and rather defers to the FAO position of recognising customary tenure in common law terms.

This move towards the recognition of customary law tenure systems alongside that of Western models of private ownership is arguably also in line with the UN Committee on Economic, Social and Cultural Rights (ESCR Committee)'s longstanding emphasis on the appropriateness of measures taken to achieve the progressive realisation of rights. In their General Comment on the right to adequate housing, for example, they add: 'The way housing is constructed ... and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing'. The Committee on the Convention to Eliminate All Forms of Discrimination has declared a failure to recognise indigenous forms of land tenure as contrary to the Convention.[45] Within this context, we argue, the *Endorois* decision, with all its flaws and missed opportunities, can and should be seen as opening a door to the recognition of customary community-based rights of rural Africans.

45 General Recommendation 23 of the Committee.

5 Recognising the title of the Endorois community

The Endorois are a community of about 60 000 people who have lived in the Lake Bogoria area of Kenya for centuries. They claimed that they were dispossessed of their land in 1973 through the government's gazetting of the land and, as a result of not being able to access their land ever since, their rights to property and religion and, as a people, their rights to development and to freely dispose of their natural resources.

The community had no formal title to the land, but sought to prove their customary ownership in terms of the concept of 'aboriginal title'. Significantly, they argued that Kenyan law does not make provision for ownership by a community (which the Kenyan government disputed in their arguments on admissibility, but to no avail) and that the African Commission was thus the only forum where they could bring this claim as a community.

The community claimed that they had a right to property both in terms of Kenyan law and the African Charter 'which recognise indigenous peoples' property rights over their ancestral land'.[46] They argued that in cultivating the land and enjoying unchallenged rights to pasture, amongst other things, 'they exercised an indigenous form of tenure, holding the land through a collective form of ownership. Such behaviour indicated traditional African land ownership, which was rarely written down as a codification of rights or title but was, nevertheless, understood through mutual recognition and respect between landholders.[47]

To support their argument, they contended that both international and domestic courts have[48]

> recognised that indigenous groups have a specific form of land tenure that creates a particular set of problems, which include the lack of 'formal' recognition of their historic territories, the failure of domestic legal systems to acknowledge communal property rights, and the claiming of formal legal title to indigenous land by the colonial authorities.

They cited *Amodu Tijani* (as the Court did in *Richtersveld*), the Canadian Supreme Court's decision in *Calder* and the Australian High Court's decision in *Mabo* as examples of courts recognising indigenous property rights even in the face of colonial seizure. In arguing that the rights of customary communities survived annexation, they quoted *Richtersveld*.[49]

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46 *Endorois* (n 4 above) para 78. In para 113, the community argues that the recognition given Kenyan law is limited and 'provides in reality only minimal rights'.

47 *Endorois* (n 4 above) para 87.

48 *Endorois* (n 4 above) para 90.

49 *Endorois* (n 4 above) para 94.

When the African Commission turns to its reasoning on the merits of the property argument, it resorts to a judgment of the European Court of Human Rights, in *Dogan v Turkey*, to reach a decision that registered title is not necessary for a right to property, and could include other rights and interests.[50]

In recognising the framework of communal property, they cite various cases of the Inter-American Commission on Human Rights at length (including *Mayagna Awas Tingni* and *Saramaka*).[51] These cases relate both to what was defined as 'indigenous' communities and 'tribal communities': the former consistent with the narrow definition of 'first nation' people, while the second community (in *Saramaka*) was in fact not indigenous to the land, but regarded as 'tribal' and therefore entitled to the protection afforded to indigenous peoples.[52] The significant point for our argument, however, is that both these definitions rely on the community sharing 'distinct social, cultural, and characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival', in the words of the Inter-American Court.[53]

The African Commission's final authority before deciding that the right to property of the Endorois community was indeed encroached upon is the UN Declaration of the Rights of Indigenous Peoples.[54]

It is difficult to understand why the African Commission completely ignored the African jurisprudence before it (both *Amodu Tijani* and *Richtersveld*). It is significant, however, as these cases dealt with communities who were not asking recognition for their system of property and governance to be treated as a 'special case' and protected from the dominant legal system by ring-fencing their rights. Rather, these communities asked for the recognition of their legal systems as equal to the dominant system – and relied on this recognition in order to gain access to the dominant legal system and assert their rights in that space.

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50 *Endorois* (n 4 above) para 188.

51 *Endorois* (n 4 above) paras 190-191.

52 This distinction was made in the ILO 169 Convention, the first significant international instrument protecting indigenous peoples' rights. Art 1 provides: 'This Convention applies to: (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.'

53 Inter-American Court of Human Rights, *Case of the Saramaka People v Suriname* (judgment of 28 November 2007) para 86.

54 *Endorois* (n 4 above) para 204.

It may be that the African Commission feels apprehensive about 'creating' law as a quasi-judicial body without being able to call on their regional and international counterparts for authority. This is particularly disappointing and alarming, however, in the face of the Commission's mandate to give content to a uniquely African document.

A second important reason may be its fear of taking politically-contentious decisions. While the Endorois community based their claim to aboriginal title on judgments that mostly protected communities not necessarily identified as 'indigenous', the African Commission was at pains to formulate its entire analysis of the merits in terms of the rights of indigenous (or 'tribal') peoples. This may be the most disheartening aspect of the decision as it could be interpreted to narrow the protection of customary tenure rights to a handful of groups in Africa recognised as 'indigenous' or 'tribal' in the analysis of the Inter-American Court cited above – leaving half of the continent out to dry. This interpretation is supported by the opening statements of the African Commission in its merits analysis.

Before going into the substance of the claims of violations, the Commission[55] notes that 'the respondent state has requested the African Commission to determine whether the Endorois can be recognised as a 'community'/sub-tribe or clan on their own'. Instead of answering this simple question, the Commission – without explanation – changes the question to: 'Are the Endorois a distinct community? Are they indigenous peoples and thereby needing special protection?'[56] The Commission's agenda to turn the case into one about the rights of indigenous peoples *only* is revealed – and continued throughout the remainder of the text.

It is with little rigour that the Commission conflates the notion of 'peoples' with 'indigenous peoples' throughout the decision, moving seamlessly from speaking about 'peoples' to speaking about 'indigenous communities', thereby intimating that peoples' rights (in the context of communal tenure at least) belong to indigenous peoples only.

For example:

> [148] The African Commission, nevertheless, notes that while the terms 'peoples' and 'indigenous community' arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems. It is aware that many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimised by mainstream development policies and thinking and their basic human rights violated. The African Commission is also aware that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms.

55 *Endorois* (n 4 above) para 145.

56 *Endorois* (n 4 above) para 146.

> [150] The African Commission also notes that the African Charter, in articles 20 through 24, provides for peoples to retain rights as peoples, that is, as collectives. The African Commission through its Working Group of Experts on Indigenous Populations/Communities has set out four criteria for identifying indigenous peoples.

This conflation by the African Commission is not only dangerous in suggesting that only indigenous communities can claim aboriginal title to land, but also because it allowed the Commission to resort to the far more stringent principles of consultation and limitation of rights that international law provides to indigenous communities without reading these into the African Charter. For example, by falling back on the international law principle of free, prior, informed consent as contained in the ILO Convention 169, amongst others, when dealing with the Endorois community's right to development, the African Commission gave no further content to the Charter right for rural communities or 'peoples' who do not benefit from the international protection of indigenous peoples.

6 Re-interpreting *Endorois*

Despite the insistence of the African Commission to narrow their legal interpretation of the Endorois' rights to those of indigenous peoples, there is a strong argument to suggest that the decision may still be used to enable customary communities to claim their tenure rights in terms of the African Charter.

Firstly, even despite itself, it seems, the African Commission acknowledges in the decision[57]

> its own observation that the term 'indigenous' is also not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities. This is the sense in which the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission. In the context of the African Charter, the Working Group notes that the notion of 'peoples' is closely related to collective rights.

It could well be argued that the marginalisation of customary law systems and the inability of domestic African courts to protect customary forms of tenure – as recognised elsewhere in the *Endorois* decision – constitute present-day injustices and inequalities. This would extend the protection to all customary communities.

We have also raised the distinction between 'indigenous' and 'tribal' peoples that is included in the *Endorois* decision by way of the citation of the cases of the Inter-American Court. Whereas the interpretation of the Inter-American Court errs on the side of caution by insisting that the two categories both refer to groups who require special protection

57 *Endorois* (n 4 above) para 149.

for the survival of their cultures, a re-interpretation of this distinction may well be possible.

Arguably, many customary communities will be able to identify themselves in terms of a broad reading of article 1(a) of the Convention, thereby providing them with the recognition of their customary ownership, the right to proper consultation and the right to natural resources in terms of the Convention.

In fact, many customary communities would be able to identify themselves as 'tribal peoples' or indeed as indigenous peoples on the African Commission's own analysis of the factual evidence in *Endorois*. Its reasoning suggests that the labels indigenous and local customary community may be used interchangeably. For example, the African Commission appears to measure the Endorois community's indigeneity to its seasonal semi-nomadic occupation of the lake shores and inland areas. However, trans-humant nomadism is but one of the characteristics of both 'indigenous' and 'local' customary communities who occupy communal land.

Finally, we argue that the connection that the African Commission makes between aboriginal rights and the right to culture provides the most important avenue for broadening the interpretation of 'peoples' to customary communities. For this argument, we turn briefly to an analysis of how the connection between these rights has been dealt with in comparative jurisprudence.

7 Recognition of custom in terms of the right to culture

Legally and politically, the justification for the doctrine of customary or aboriginal title is the protection of culture.

We argue that in the case of indigenous (or tribal) communities the argument for the protection of their property rights is more often than not about the survival of a 'distinct' culture on land currently and or partially occupied by the group defining itself as an indigenous community with a distinct culture. It is a form of 'special' protection for a community that finds themselves outside the dominant development discourse, culturally, socially and economically and, we would add, legally. As such, this protection can only be afforded to minorities and does little to integrate these communities within the 'formal' legal systems of their countries.

In the case of communities on communal land adhering to living customary law by contrast, the argument for the recognition of their rights to property is about the recognition of informal tenure rights as cultural activities and therefore the right to culture.[58] In other words,

58 K Lehman 'Aboriginal title, indigenous rights and the right to culture' (2004) 20 *South African Journal on Human Rights* 1. She questions whether the doctrine of aboriginal title really is of value for South African communities.

the way in which these communities exercise their tenure rights within a communal system is an articulation of their culture – and must thus be protected simply on the basis of their right to exercise their culture. It does not matter whether the community is distinct in every way, or whether their cultural survival is linked to a specific piece of land, or whether they constitute a minority. If they can demonstrate a system of tenure, then this system constitutes a form of aboriginal title. If this title has never explicitly been extinguished by statute, then the title deserves recognition and protection based on the system being an expression of the culture of the people.

This distinction is nuanced. The African Commission missed it in its decision in *Endorois*. The jurisprudence with regard to aboriginal title could be read to support this assertion – but also indicates that courts have always battled to keep distinction with regard to land and culture clear.

The Canadian jurisprudence on aboriginal title is concerned with the aboriginal rights recognised under its Constitution. The Supreme Court recognises the protection of culture as the rationale behind the recognition of specific customary rights in land over which communities do not enjoy full ownership of customary title.

The link between land and culture was clearly made in Canada by the Supreme Court in *R v Adams* and *R v Van der Peet*:[59]

> Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition.

In *Van der Peet*, the Court was preoccupied with the integrality of the customary practice or cultural activity to the culture and the distinctiveness and difference of culture.[60] In the next important decision of the Canadian Supreme Court on aboriginal title, it spelt out the theoretical underpinning of the doctrine of aboriginal title in disappointingly narrow terms:[61]

> Although aboriginal title is a species of aboriginal right recognised and affirmed by s 35(1), it is distinct from other aboriginal rights because it arises where the connection of a group with a piece of land was of central significance to their distinctive culture. From this passage it is clear that the Supreme Court will grant Aboriginal Title only to those groups for whom a piece of land was, historically, of central significance to their distinctive culture ... A piece of land being of central significance to the culture of

59 *R v Van der Peet* (1996) 2 SCR 507 45.

60 The court must look in identifying aboriginal rights to what makes those societies distinctive, gives it a core identity, and a people's culture being one that 'truly made the society what it was'. This is implied by para 56 in *Van der Peet* (n 59 above).

61 *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193.

> the group in question then, appears to be the theoretical rationale behind granting aboriginal title.

The centrality of land to the culture then apparently becomes the 'rationale' – similar to definitions of indigenous peoples as related in the *Endorois* decision.

In *Sappier*,[62] the Canadian Supreme Court's more recent consideration of aboriginal rights, the Court rejected the *Van der Peet* articulation of the standard for aboriginal title recognition. It now states that the use of the word 'distinctive' as a qualifier is meant to incorporate an element of aboriginal specificity. However, 'distinctive' does not mean 'distinct', and the notion of aboriginality must not be reduced to 'racialised stereotypes of aboriginal peoples'. It continues: 'Flexibility is important when engaging in the *Van der Peet* analysis because the object is to provide cultural security and continuity for the particular aboriginal society.'[63] The essential test, however, seemingly remains that the court must also determine whether the activity claimed to be an aboriginal right is part of a practice, custom or tradition that was an integral part of the distinctive culture of the aboriginal community asserting the right prior to contact with Europeans.[64]

This interpretation that underplays the necessity of the cultural relation to land is supported by the Human Rights Committee. In *Apirana Mahuika and Others v New Zealand*,[65] the Committee observed that

> minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture [which] may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities or any other communities constituting a minority.

Likewise, Australian courts have held that aboriginal title is rooted in the traditional laws and customs of aboriginal peoples. To the extent that indigenous communities have survived dispossession from their land, they possess a title to the land based on their traditional laws and customs.

Arguably, the South African courts have gone further than their international counterparts in its application of so-called 'indigenous law', culture and its relation to land. It may even be argued that the right to culture has been linked explicitly to customary land tenure and rules. The Constitutional Court in *Richtersveld* based its finding of aboriginal

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62 *R v Sappier; R v Gray* 2006 SCC 54, [2006] 2 SCR 686 para 45.

63 *Sappier* (n 62 above) para 33. 'Culture' refers to the 'way of life of particular aboriginal community, including their means of survival, their socialisation methods, their legal systems, and, potentially, their trading habits' (para 45).

64 *Ahousaht Indian Band and Nation v Canada (Attorney-General)* 2009 BCSC 1494; *Ahousaht Indian Band and Nation v Canada (Attorney-General)* 2011 BCCA 237.

65 Communication 547/1993, CCPR/C/70/D/547/1993 (2000) para 9.7; General Comment 23: The Rights of Minorities (art 27) (50th session, 1994), CCPR/C/21Rev 1/Add 5, 4 August 1994, paras 1 & 3.2.

title on a finding by the Supreme Court of Appeal according to which *the mainstay of the community's culture was its customary land tenure laws and rules* – but not its link to a specific piece of land.

The South African Constitution, like the African Charter and the International Covenant on Civil and Political Rights (ICCPR),[66] recognises a direct right to culture. This may attract a negative and positive content. It may require the nation state to take positive measures to ensure the promotion and development of the right to culture including its attributes of developing local living law, customary title and customary rights in land. In short, the following principles emerge from this jurisprudence:

(a) Communal ownership is associated with customary law and culture.
(b) Customary community law is founded on the premise that it is a system of law developed by the community through practice by the community. A thorough investigation on a case-by-case basis is necessary to ascertain its content.
(c) What matters for a community seeking protection of its communal land is that it defines itself as adhering to customary law.
(d) The community's custom as culture may be related to a specific territory, but this is not essential (for example in the case of communities that have been removed from their land).

In *Endorois*, the right to culture is given limited explicit coverage. Despite this, we would argue that the right to culture is crucial to the overall approach of the African Commission.

The property and development rights asserted and recognised in *Endorois* are inextricably linked to the community's culture with the relevance granted to the promotion of culture in the African Commission's premises relating to the bearers of rights and victims of violations of rights. The African Commission argues that, under the African Charter, the concept community, indigenous or otherwise, recognises the links between people, their land and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people. It thus understands culture to mean that complex whole which (may) include a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs: the sum total of the material and spiritual activities and products of a given social group that distinguishes it from other similar groups.

66 The UN Human Rights Committee interprets the right to culture to include 'economic and social activities which are part of the culture of a community' to which indigenous peoples belong. *Chief Bernard Ominayak and the Lubicon Lake Band v Canada* Communication 167/1984, UN Doc CCPR/C/38/D/167/1984 (1990) para 32.2.

This interpretation is significant as the right to culture cannot be limited.[67] Thus, if customary forms of tenure are indeed understood to be central to a community's culture, it provides a strong argument for the recognition and protection of these land rights.[68]

8 Consent in customary law and *Endorois*

A short note on consent and customary law is apposite because the consent standard for any limitation on the right to property, culture and development reflects respect for and recognition of customary law and culture. The customary law tenure rules of communities, as expected, require community permission before outsiders could use and share in the community's property and resources.[69] The scope of possible transactions with parties who are not part of or members of the community and its legal systems is restricted. The nature of aboriginal title has been found to eschew alienation of the resource.[70]

In *Endorois*, the African Commission set a high standard of limitation to the right to development of the community. It emphasised community equity and choice and required of the state that[71]

> [in] any development or investment projects that would have a major impact within the Endorois territory, the state has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.

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67 In para 249 it is stressed that the right to culture in the African Charter does not have a claw-back clause.

68 The power of cultural rights are illustrated when the Commission finds that any infringement of the right amounting to the denial of access to heritage sites and resources for their livelihoods, and destroying the community's way of life, cannot be rationally justifiable and proportionate to any conservation aim.

69 *Richtersveld Community & Others v Alexkor Ltd & Another* 2001 3 SA 1293 (LCC) para 65. The circumstances that the Richtersveld people, prior to being excluded from the subject land, occupied it and regarded it as their own, is evidenced by the fact that outsiders required permission before they could use the land (a requirement which they were not always able to enforce), and that grazing fees were extracted from outsiders whenever possible. The *Richtersveld* SCA judgment (in para 18) similarly emphasises the central rule of permission of access to outsiders: 'All members of the community had a sense of legitimate access to the land to the exclusion of all other people. Non-members had no such rights and had to obtain permission to use the land for which they sometimes had to pay ... The captain and his "raad" enforced the rules relating to the use of the communal land and gave permission to newcomers to join the community or to use the land.' In *Delgamuukw* (n 61 above) paras 157 and 158, the Supreme Court considers aboriginal trespass laws and aboriginal treaty law providing for 'permission ... granted to other aboriginal groups to use or reside even temporarily on land'.

70 *Delgamuukw* (n 61 above) para 129: '... lands held by virtue of aboriginal title may not be alienated. Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it.'

71 *Endorois* (n 4 above) para 291.

The African Commission found that the Endorois community suffered a 'major impact' and ruled that the procedural development right had been violated. It did not elaborate on what in general terms would constitute major as opposed to other impact. It referred to international precedent and soft law on the content of the free prior informed consent standard. We would argue that customary law also provides a sound basis for the consent requirement.

The principle and right of 'free, prior and informed consent' demands that states and institutions obtain the consent and authorisation of customary communities before adopting and implementing development projects, land use changes or new laws that may affect them. Information on the likely impact of activities must be disclosed in advance. The development process should be self-determined and any development project must respond to community concerns and prioritisation. This cannot happen without a legitimate process of participation in decision making and consent. The consent principle requires full and effective participation at every stage of any action that may affect communities directly or indirectly. Communities should be included as competent partners in projects that affect their sphere of existence and culture.

In addition to being free, prior, informed and consensual, such consent must be enduring, enforceable and meaningful.[72] In this context, meaningfulness translates into tangible recognition, in word and deed. Recognition of the rights of traditional communities over their lands as the basis for negotiations over proposed extractive industries, necessarily involves the organisation of engagement, partnership and sharing of financial benefits. In instances where communities consent to extractive activities on their land, payments or benefit-sharing arrangements should be based on annual reviews throughout the life of the activity. Incomes from any mining must cover all costs associated with closure and restoration and include sufficient funds to provide for potential future liabilities.

Where benefit-sharing arrangements are channelled through a foundation or other entity, corporations must ensure that these entitlements remain under the control of the customary community.[73] Consent is not transferable.

9 Conclusion

We have argued that there is an urgent need for the recognition of customary forms of tenure of communities across the continent in

72 LJ Laplante & SA Spears 'Out of the conflict zone: The case for community consent processes in the extractive sector' (2008) 11 *Yale Human Rights and Development Law Journal* 17.

73 Report of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social Responsibility: Manila Philippines Permanent Forum on Indigenous Issues, New York: United Nations E/C 19/2009/CRP, 4 May 2009.

order to allow them to have an effective 'bargaining position' when confronted with the possibility of land grabs. While we have shown that this need has similarly been identified by international organisations and the African Union itself, we argue that it cannot be done, as is often suggested, by awarding common law tenure rights to customary communities and formalising these – because common law notions are by and large incompatible with customary law forms of tenure.

The jurisprudence on aboriginal title and customary ownership, including associated jurisprudence on land-related resources such as forests and fisheries, can be depicted as a search for the current and future legal implications of

(a) cultural activities, practices and customs;
(b) often exercised in terms of customary law.

The different outcomes in the different jurisdictions of evaluation exercises of such activities more often than not depend on the relative weight given to customary law as opposed to common law. The African Charter and the *Endorois* decision may offer a new angle. The right to culture and the promotion of cultural rights apply equally to indigenous and other communities who use communal land under customary law. It requires that the relevance of cultural activities in recognising land and tenure rights be considered in terms of and through the lens of living customary law.

This potential will only be unlocked, however, if the African Commission (and even domestic African courts) recognises customary communities as 'peoples' whose rights to development and resources deserve protection. While we are critical of the Commission's deference to international jurisprudence despite relevant African jurisprudence argued before them, we argue that the African Commission's reasoning still resonates with the understanding of aboriginal title developed in the South African Constitutional Court and other foreign and international jurisdictions. We submit that the right to culture as protected in the African Charter (devoid of a claw-back clause) provides the basis for an interpretation of the protection of custom as culture. As the South African courts have recognised, customary land holding is often the central expression of a community's culture. In keeping with this argument, there is no need to resort to a definition of indigenous peoples and evaluate communities in terms of their aboriginality or indigeneity in order to protect the land rights of a community.

This will require a brave leap by the African Commission which may have risky political consequences. However, if we fail to provide this protection to the customary communities of Africa, it becomes difficult to argue that the African Charter is indeed an instrument for the protection of the continent's peoples.

AFRICAN HUMAN RIGHTS LAW JOURNAL

A covenant of compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples' Rights

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Summary

South Africa's relatively peaceful transition from apartheid to democracy would not have been possible without the prevalence of a spirit of solidarity (ubuntu), not only within South Africa but across the continent, since it is largely due to African solidarity with the struggle against apartheid that an enabling environment for negotiation could be created. Therefore, the importance of including the unique and unprecedented solidarity rights of peoples in the African Charter on Human and Peoples' Rights cannot be emphasised enough. The rights of peoples – to existence, equality, self-determination, sovereignty over natural resources, peace and security, development and a satisfactory environment – were included in the African Charter for historical and philosophical reasons rooted uniquely in the African experience. The recognition of these rights has been resisted in other parts of the world along the lines of ideological division drawn during the Cold War. Solidarity rights, founded on the philosophy of African humanism, did not fit into the Cold War jurisprudential dichotomy, which featured, at the one extreme, the Western emphasis on liberty, rights and competition and, at the other extreme, the Eastern emphasis on equality, duties and compulsion. The solidarity rights rather represented an African emphasis on fraternity, reciprocity and compassion. African humanism has been applied in practice as a viable and valuable legal philosophy,

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particularly by the Constitutional Court of South Africa. Solidarity rights in the African Charter are similarly applicable as viable and valuable legal constructs, and therefore their precise contents and consequences may and must be explored through practical enforcement.

> We face neither east nor west. We face forward.
>
> Kwame Nkrumah

1 Context: Struggle and solidarity

1.1 A South African story

When I was born, 25 years ago, I did not know that my country was at war with itself and the world. I did not know that I was being born during a state of emergency, and that my government was developing nuclear weapons and committing murder and torture in my name, in the name of my skin.[1] I did not know that compassion was a crime in my country. And I did not know that, on the very day I was born, one of my countrymen was being condemned to death. He had been convicted of murdering a poet he perceived as a traitor to the struggle against apartheid.[2] It eventually emerged that the poet, Ben Langa, had been tarred as a traitor, and consequently killed, only on the basis of misinformation planted by the apartheid security police.[3] It could not have been predicted that, less than a decade later, Pius Langa would find himself sitting as a justice of the newly-created Constitutional Court of South Africa, abolishing precisely the penalty imposed on the men who murdered his brother. Yet, in *S v Makwanyane*,[4] that is exactly what he did, for the following reasons:[5]

> The emphasis I place on the right to life is, in part, influenced by the recent experiences of our people in this country. The history of the past decades has been such that the value of life and human dignity has been demeaned. Political, social and other factors created a climate of violence resulting in a culture of retaliation and vengeance. In the process, respect for life and for the inherent dignity of every person became the main casualties. The state has been part of this degeneration, not only because of its role in the conflicts of the past, but also by retaining punishments which did not testify to a high regard for the dignity of the person and the value of every human life.

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1 See eg Truth and Reconciliation Commission of South Africa *Final Report* (1998), particularly vol 2, http://www.justice.gov.za/trc/report/index.htm (accessed 23 September 2011).

2 *S v Payi* 14 March 1986, South African Supreme Court of Appeal Case 16/86, unreported, http://www.saflii.org/za/cases/ZASCA/1986/15.html (accessed 13 June 2011).

3 Truth and Reconciliation Commission, Amnesty Committee, Decision AC/2000/157 in Application AM 6450/97, http://www.justice.gov.za/trc/decisions/2000/ac200157.htm (accessed 16 June 2011).

4 *S v Makwanyane & Another* 1995 3 SA 391 (CC) (*Makwanyane*).

5 *Makwanyane* (n 4 above) paras 218 & 226.

> We have all been affected, in some way or another, by the 'strife, conflict, untold suffering and injustice' of the recent past. Some communities have been ravaged much more than others. In some, there is hardly anyone who has not been a victim in some way or who has not lost a close relative in senseless violence. Some of the violence has been perpetrated through the machinery of the state, in order to ensure the perpetuation of a *status quo* that was fast running out of time. But all this was violence on human beings by human beings. Life became cheap, almost worthless.
>
> It was against a background of the loss of respect for human life and the inherent dignity which attaches to every person that a spontaneous call has arisen among sections of the community for a return to *ubuntu*.

1.2 A spirit of solidarity

Seen in context, the reference in this judgment to the ethical concept of *ubuntu* is deeply meaningful. *uBuntu* is the spirit that steadied South Africa's transition from racist repression to a constitutional democracy, by valuing reconciliation over retribution, and compassion over confrontation.[6] It is significant that the Constitutional Court abolished the death penalty only a year after the dawn of democracy, before the Truth and Reconciliation Commission could help to heal the wounds of the past, and when so many people harboured the hope that those who murdered their loved ones in the name of apartheid would face the same fate.[7]

However, there is a further, unseen and unintended significance to the Court's tribute to *ubuntu*. South Africa's transition would surely not have been possible without countless acts of courageous compassion from people across the African continent. During the darkest days of apartheid, a powerful spirit of solidarity took root, from Lusaka to Lagos, from Maputo to Mogadishu, from Dakar to Dar es Salaam. Our neighbours gave refuge to our exiled leaders, lent support to our struggle, and endured frightful reprisals at the hands of the apartheid state and its allies.[8] This solidarity was immortalised in an international pact in 1981, when the free states of Africa united in signing the African Charter on Human and Peoples' Rights (African Charter):[9]

> Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid ... and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion.

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6 See eg *Dikoko v Mokhatla* 2006 6 SA 236 (CC) (minority judgment of Sachs J) para 113.

7 See D Tutu *No future without forgiveness* (2000) 13-31.

8 See M Meredith *The state of Africa: A history of fifty years of independence* (2005) 412-442.

9 African Charter, Preamble.

1.3 A right to solidarity

The African Charter came into force in October 1986, and all Africans became the bearers of unique and unprecedented rights. Significantly, the Charter recognised the right of all peoples to self-determination,[10] and with it the 'right to the assistance of the state parties to the present Charter in their liberation struggle'.[11] In this sense, the African Charter truly enshrined a right to solidarity. This is momentous because it is substantially to continental solidarity that the success of the struggle against apartheid is owed. However, as we all well know, the struggle continues, not only in South Africa but across the continent: that is, the struggle for the very existence and equality of peoples, for genuine self-determination and sovereignty over our natural resources, for peace, development, and a healthy environment. In many ways, this is the timeless struggle between 'society' and 'the state'. This struggle is far from over, and if it is to succeed, what we will require, above all, is solidarity.

It bears mention that solidarity is sustained through institutions, which serve as centres of information, communication and commonality, among peoples divided by vast distances and social differences, but united in their commitment to human dignity, liberty and equality. Twenty-five years ago, two such institutions were created. In South Africa, in May 1986, between two states of emergency, the Centre for Human Rights was founded at the University of Pretoria, and it has been at the forefront of human rights education and academic activism ever since. In October of that year, with the entry into force of the African Charter, the African Commission on Human and Peoples' Rights (African Commission) came into being, mandated 'to promote human and peoples' rights and ensure their protection in Africa'.[12] I feel distinctly privileged, therefore, in the twenty-fifth year of my life and theirs, to celebrate 30 years of the African Charter by discussing its unique rights of solidarity, and the spirit of solidarity that underlies them, which binds us together, as Africans, in our common pursuit of sustainable peace and progress.

2 Concept: Rights of solidarity

2.1 A universal declaration of human rights

The adoption of the Universal Declaration of Human Rights (Universal Declaration) in 1948 was the first phase of a project called the Inter-

10 Art 20(1) African Charter.

11 Art 20(3) African Charter.

12 Art 30 African Charter.

national Bill of Human Rights,[13] which would include the adoption of two binding international instruments in 1966: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). When these Covenants came into force in 1976, the project was concluded, but not yet completed. ICCPR enshrined primarily 'negative' rights (such as life, liberty and privacy), corresponding to articles 3 to 21 of the Universal Declaration, which require states to *refrain from* certain intervention.[14] ICESCR enshrined primarily 'positive' rights (such as housing, healthcare and social security), corresponding to articles 22 to 27 of the Universal Declaration, which require states to *resort to* certain intervention.[15] However, neither of the Covenants enacted the right reflected in article 28 of the Universal Declaration: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.' Although article 1 common to both Covenants proclaims that '[a]ll peoples have the right of self-determination', by virtue of which they may 'freely determine their political status and freely pursue their economic, social and cultural development',[16] and may also 'freely dispose of their natural wealth and resources',[17] this right has been restricted, in its interpretation, to contexts of colonial domination.[18]

2.2 A universal declaration of the rights of peoples

When the two international covenants came into force in 1976, it was recognised by a conference of academics and activists in Algiers that 'the quest for a new international, political and economic order' was far from complete:[19]

> Aware of expressing the aspirations of our era, we met in Algiers to proclaim that all the peoples of the world have an equal right to liberty, the right to free themselves from any foreign interference and to choose their own government, the right if they are under subjection, to fight for their liberation and the right to benefit from other peoples' assistance in their struggle.

13 Resolution 217(III): International Bill of Human Rights – Part A: Universal Declaration of Human Rights, United Nations General Assembly (UNGA) 10 December 1948.

14 In art 2 of ICCPR, each state party undertakes 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant'.

15 In art 2 of ICESCR, each state party undertakes 'to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant'.

16 Art 2(1) ICCPR; art 1(1) ICESCR.

17 Art 1(2) ICCPR; art 1(2) ICESCR.

18 FL Kirgis Jr 'The degrees of self-determination in the United Nations era' (1994) 88 *American Journal of International Law* 304-305.

19 Universal Declaration of the Rights of Peoples (Algiers Declaration), adopted 4 July 1976, http://www.chr.up.ac.za/images/files/documents/ahrdd/theme31/peoples_rights_algiers_universal_declaration_1976.pdf (accessed 16 June 2011), Preamble.

> Convinced that the effective respect for human rights necessarily implies respect for the rights of peoples, we have adopted the Universal Declaration for the Rights of Peoples.

A truly visionary document, the Algiers Declaration proclaimed for all peoples the right to existence,[20] the right to political self-determination,[21] economic rights,[22] the right to culture,[23] the right to the environment and common resources,[24] and the rights of minorities.[25] These rights were to be 'exercised in a spirit of solidarity amongst the peoples of the world and with due regard for their respective interests'.[26] The obligations arising from these rights were owed 'towards the international community as a whole',[27] and owed by 'all members of the international community'.[28]

2.3 A third generation of human rights

In a similar sense, the United Nations Educational, Scientific and Cultural Organisation (UNESCO)'s Director-General at that time, the Senegalese educator Amadou-Mahtar M'Bow, observed that ICCPR and ICESCR represented, respectively, only the first and the second generations of human rights, and that a 'third generation of human rights' still required similar recognition.[29] The three generations of human rights were correspondingly compared to the three themes of the French Revolution: *liberté*, *égalité* and *fraternité*.[30] While ICCPR concerned itself with liberty, and ICESCR concerned itself with equality, neither covenant placed any emphasis on fraternity or solidarity. Thus, in 1977, the Director of UNESCO's Division on Human Rights and Peace, Karel Vašák, presented the following thesis:[31]

> The international community is now embarking upon a third generation of human rights which may be called 'rights of solidarity'. Such rights include the right to development, the right to a healthy and ecologically balanced environment, the right to peace, and the right to ownership of the common heritage of mankind. Since these rights reflect a certain conception of

20 Arts 1-4 Algiers Declaration.

21 Arts 5-7 Algiers Declaration.

22 Arts 8-12 Algiers Declaration.

23 Arts 13-15 Algiers Declaration.

24 Arts 16-18 Algiers Declaration.

25 Arts 19-21 Algiers Declaration.

26 Art 12 Algiers Declaration; see also arts 18 & 21.

27 Art 22 Algiers Declaration.

28 Art 30 Algiers Declaration.

29 K Vašák 'A 30-year struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights' (1977) 30 *The UNESCO Courier* 29.

30 P Alston 'A third generation of solidarity rights: Progressive development or obfuscation of international human rights law' (1982) 29 *Netherlands International Law Review* 307 310-311.

31 Vašák (n 29 above) 29.

> community life, they can only be implemented by the combined efforts of everyone: individuals, states and other bodies, as well as public and private institutions.

In a world plagued by growing insecurity and inequality, it became clear that the full realisation of first and second generation rights 'required international co-operation through solidarity of all peoples',[32] and so the third generation immediately captured the imagination of the international human rights community. At conference after conference, and in resolution after resolution, the rights of solidarity were proclaimed and propounded, as a concept, but their contents were never clearly defined, and their practical consequences were never fully explored.[33] The envisaged 'Third Covenant' was never drafted and never tabled at the United Nations (UN), and to this day these rights remain obscure and unenforceable in the global architecture of human rights.

3 African Charter: Peoples' rights

3.1 An unprecedented development

In June 1981, at the 18th Assembly of Heads of State and Government of the Organization of African Unity (OAU) in Nairobi, the African Charter on Human and Peoples' Rights was adopted, giving the African continent the most comprehensive and progressive international human rights instrument the world has ever seen. The African Charter is the first and only binding international instrument that directly recognises the solidarity rights of peoples: to existence, equality, self-determination, sovereignty over natural resources, peace, development and environment.[34]

Although the African Charter itself does not define the concept of 'peoples', it is clear that a people is something separate from the state,[35] since 'the primary impact of [a peoples' right] is against the government of the state in question, and one of its main effects is to internationalise key aspects of the relationship between the people concerned and that state'.[36] Fatsah Ouguergouz, a judge of the African Court on Human and Peoples' Rights (African Court), has described it as a 'chameleon-like term', 'whose content is dependent on the

32 F Hassan 'Solidarity rights: Progressive evolution of international human rights law?' (1983) 1 *New York Law School Human Rights Annual* 54.

33 See P Alston 'Peoples' rights: Their rise and fall' in P Alston (ed) *Peoples' rights* (2001) 259.

34 Arts 19-24 African Charter.

35 R Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80.

36 J Crawford 'Some conclusions' in J Crawford (ed) *The rights of peoples* (1988) 164.

function of the right concerned'.[37] Still, the African Commission has developed certain criteria for the identification of 'peoples':[38]

> The African Commission is thus aware that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as 'peoples', that is, a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under articles 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights.

It is important at this stage to clarify that, although the discourse on 'third generation' rights of solidarity revolved around the rights to peace, development and environment, these rights are not the only rights of solidarity. Rather, I contend that all of the rights recognised as peoples' rights in the African Charter are rights of solidarity. This is true because the existence and equality of peoples, as well as their self-determination and sovereignty over their natural resources, cannot be fully realised without compassion and co-operation across borders, not only by states but by other peoples, persons and corporations. The protection and promotion of these interests also (alongside peace, development and environment) require concerted efforts by everyone. The inherent imbalance of status and power between a people and a state is such that the vindication of peoples' rights requires solidarity among peoples across borders.

3.2 A historical and philosophical imperative

The recognition of the solidarity rights in the African Charter is rooted in two reasons unique to the African world view. One reason is historical, remembering that the African experience of human rights violations was largely of widespread and systematic violations of the rights of entire peoples rather than specific individuals, through slavery, colonialism and apartheid. In colonised Africa, 'the state' was a notion in contrast and indeed in conflict with that of 'the people', and solidarity among peoples was necessary to break the bonds of oppression. The other reason is philosophical, reflecting that, in African social theory, a person 'is not an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity'.[39] On this aspect, the OAU Rapporteur on the African Charter offered an insightful account:[40]

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37 F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 211.

38 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case) para 151.

39 OB Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: Comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly* 148.

40 Rapporteur's Report (OAU Doc CM/1149 (XXXVII)) para 10, quoted in Kiwanuka (n 35 above) 82.

> Noting that in Africa, Man is part and parcel of the group, some delegations concluded that individual rights could be explained and justified only by the rights of the community. Consequently, they wished that the Draft Charter made room for the peoples' rights and adopt[ed] a more balanced approach to economic, social and cultural rights on the one hand and civil and political rights on the other.

In its final form, the African Charter explicitly invokes these historical and philosophical imperatives in its Preamble:

> Reaffirming the pledge they solemnly made in article 2 of the [OAU] Charter to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;
>
> Taking into consideration the virtues of their historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights;
>
> Recognising, on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights ...

3.3 A principle of solidarity

Solidarity, as a principle, has been a fundamental pillar of African international law since the adoption of the Charter of the OAU in 1963, which proclaims among its purposes to 'promote the unity and solidarity of the African states',[41] and to 'co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa'.[42] The OAU's successor, the African Union (AU), also aims to 'achieve greater unity and solidarity between the African countries and the peoples of Africa',[43] and 'to strengthen solidarity and cohesion among our peoples'.[44] Solidarity, as a principle of international law, has been best described as follows: 'Solidarity requires an understanding and acceptance by every member of the community that it consciously conceives of its own interests as being inextricable from the interests of the whole.'[45]

This conception of solidarity accords closely with the historical and philosophical rationale for recognising peoples' rights in the African Charter. It is understandable, therefore, that the principle of solidarity features so strongly in the structure of African institutional law.

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41 Art 2(1)(a) Charter of the Organization of African Unity, 25 May 1963 (OAU Charter).

42 Art 2(1)(b) OAU Charter.

43 Art 3(a) Constitutive Act of the African Union, 11 July 2000 (AU Constitutive Act).

44 Preamble AU Constitutive Act. See also Kigali Declaration, AU Ministerial Conference on Human Rights in Africa, May 2003, art 31.

45 R St J MacDonald 'Solidarity in the practice and discourse of public international law' (1996) 8 *Pace International Law Review* 290.

4 Culture: African humanism

4.1 A philosophy of solidarity

Fundamental to the notion of peoples' rights or solidarity rights is the philosophy of African humanism, which is ascertainable among most pre-colonial African societies, as a philosophy of compassion, community and solidarity.[46] I use the term 'African humanism' broadly to embrace the various social theories propounded by African anthropologists and philosophers that are united by the notion that the identity and morality of the individual are inextricably bound by her or his relationships with others in society. This is a point of consensus among most modern reformulations of traditional philosophy across the continent, including Kwame Nkrumah's Consciencism, Kenneth Kaunda's Humanism and Julius Nyerere's *Ujamaa*.[47]

In South Africa, African humanism finds its most prominent expression in the ethical concept of *ubuntu*, the meaning of which is unpacked in the Zulu proverb *umuntu ngumuntu ngabantu* (literally, a person is a person through people). In a Constitutional Court judgment relating to freedom of religion, Justice Langa discussed *ubuntu* as an African social theory, as follows:[48]

> The notion that 'we are not islands unto ourselves' is central to the understanding of the individual in African thought. It is often expressed in the phrase *umuntu ngumuntu ngabantu* which emphasises 'communality and the inter-dependence of the members of a community' and that every individual is an extension of others. According to Gyekye, 'an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons'. This thinking emphasises the importance of community to individual identity and hence to human dignity. Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity. Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions.

In seSotho and seTswana, the same concept is called *botho*. In Shona, it is known as *unhu*, and in Chichewa it is *umunthu*. In Kinyarwanda and Kirundi, the word *ubuntu* means humanity or human generosity, and the word *obuntu* bears a similar meaning in the Kitara dialect clus-

46 See Y Mokgoro '*Ubuntu* and the law in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 1 15-17.

47 MM Makumba *An introduction to African philosophy: Past and present* (2007) 134-144.

48 *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 1 SA 474 (CC) para 53 (footnotes omitted).

ter in East Africa. The late Nigerian anthropologist, Victor C Uchendu, described a principle of 'kinship' prevailing in West Africa:[49]

> The kinship principle provided the individual with a community whose moral order emphasised shared values, a sense of belonging, security and social justice. In such social order duties preceded rights. The principle was clear: to enjoy your rights you must do your duty; and duty and right have a reciprocal relationship, and structurally both were balanced.

The limitation of first and second generation human rights is that they demand delivery from the state, and thereby abstract all responsibility away from the individual. African humanism, fostered in tribal societies not structured as nation states, does not divorce the individual from her or his community, nor her or his responsibility to the community, through the avatar of the state. Relations within the community, and its relations with other communities, were always the collective responsibility of the community members themselves. In this respect, an illuminating exposition is provided by Murungi:[50]

> Certainly, in Africa, but not only in Africa, personhood is social. African jurisprudence is a part of African social anthropology. Social cohesion is an essential element of African jurisprudence. Areas of jurisprudence such as criminology and penology, law of inheritance, and land law, for example, focus on the preservation of and promotion of social cohesion. This cohesion is a cohesion that is tempered by justice. Justice defines a human being as a human being. Thus, injustice in Africa is not simply a matter of an individual breaking a law that is imposed on him or her by other individuals, or by a collection of individuals who act in the name of the state. It is a violation of the individual's duty to him or herself, a violation of the duty of the individual to be him or herself – the duty to be a social being.

In contrast to Western legal philosophies, *ubuntu* 'does not conceive of a social bond as one that precedes through an imagined social contract'.[51] As Cornell and Muvangua argue:[52]

> *uBuntu* is both the African principle of transcendence for the individual, and the law of the social bond. In *ubuntu* human beings are intertwined in a world of ethical relations and obligations from the time they are born. The social bond, then, is not imagined as one of separate individuals ... We come into the world obligated to others, and in turn these others are obligated to us, to the individual. Thus, it is a profound misunderstanding of *ubuntu* to confuse it with simple-minded communitarianism. It is only through the

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49 VC Uchendu *Tradition and social order*, inaugural lecture, University of Calabar, Nigeria, 11 January 1990, as cited in UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 19. See also the fascinating study on Islamic law and solidarity rights by J Morgan-Foster 'Third generation rights: What Islamic law can teach the international human rights movement' (2005) 8 *Yale Human Rights and Development Law Journal* 67.

50 J Murungi 'African jurisprudence: Hermeneutic reflections' in K Wiredu (ed) *A companion to African philosophy* (2006) 519 552-553

51 D Cornell & N Muvangua *Law in the* ubuntu *of South Africa* (2009) 10, http://isthisseattaken.co.za/pdf/Papers_Cornell_Muvangua.pdf (accessed 16 June 2011).

52 As above. See also I Menkiti 'On the normative conception of a person' in K Wiredu (ed) *A companion to African philosophy* (2006) 326.

> engagement and support of others that we are able to realise a true individuality and rise above our biological distinctiveness into a fully developed person whose uniqueness is inseparable from the journey to moral and ethical development.

4.2 A viable legal philosophy

Viewed with its vocabulary of rights and duties, African humanism naturally translates from a social philosophy into a legal philosophy, and as such it has increasingly been applied to concrete legal disputes by national courts across the continent. For instance, the Tanzanian Court of Appeal has held as follows in respect of constitutional interpretation:[53]

> The second important principle or characteristic to be borne in mind when interpreting our Constitution is a corollary of the reality of co-existence of the individual and society, and also the reality of co-existence of rights and duties of the individual on the one hand, and the collective of communitarian rights and duties of society on the other. In effect this co-existence means that the rights and duties of the individual are limited by the rights and duties of society, and *vice versa*.

In justifying the abolition of the death penalty by the Constitutional Court of South Africa, Justice Yvonne Mokgoro explained that *ubuntu* 'envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'.[54] Justice Tholakele Madala observed that it 'calls for a balancing of the interests of society against those of the individual',[55] and Justice Pius Langa described the theory as follows:[56]

> It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

This judgment was also applied by the Ugandan Constitutional Court, when it declared the sentence of banishment for the crime of witchcraft to be cruel and inhuman punishment and therefore unconstitutional:[57]

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53 *Director of Public Prosecutions v Pete* [1991] LRC (Const) 553 566b-d, cited in *Makwanyane* (n 4 above) para 224.

54 *Makwanyane* (n 4 above) para 308.

55 *Makwanyane* (n 4 above) para 250.

56 *Makwanyane* (n 4 above) para 224.

57 *Salvatori Abuki & Another v Attorney-General* [1997] UGCC 5, Constitutional Case 2 of 1997, 13 June 1997, http://www.ulii.org/ug/cases/UGCC/1997/5.html (accessed 16 June 2011).

> Of course, the concept of '*ubuntu*', the idea that being human entails humaneness to other people, is not confined to South Africa or any particular ethnic group in Uganda. It is the whole mark of civilised societies ... It will be recalled that the word '*ubuntu*', though linguistically peculiar to only certain groups, is a concept embraced by all the communities of Uganda.

Botho has recently been invoked by the Lesotho High Court in the context of the law of succession, to preclude the dispossession of a widow[58] and, in South Africa, it has also been applied to the law of defamation.[59] Despite its many detractors,[60] I contend that African humanism is indeed viable as a legal philosophy, and that the rights of solidarity bear unique jurisprudential value.

4.3 A valuable legal philosophy

The African Charter is unique among international human rights instruments, not only because it includes peoples' rights, but because it includes a chapter on individual *duties*.[61] According to article 27 of the African Charter:

1 Every individual shall have duties towards his family and society, the state and other legally-recognised communities and the international community.
2 The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

With its equality of emphasis on rights and duties, African humanism represents a theory of *reciprocity*.[62] However, the notion that a person forms part of a people, in a relationship of reciprocal rights and duties, was met with apprehension and hostility by a number of states and societies from the developed world. African humanism 'stands in stark contrast to the atomistic view of the Western world, which regards individuals as locked in a constant struggle against society for the redemption of their rights'.[63] The United States and the United

58 *Mokoena v Mokoena & Others* [2007] LSHC 14, Case CIV/APN/216/2005, 16 January 2007, http://www.saflii.org/ls/cases/LSHC/2007/14.html (accessed 16 June 2011).

59 *Dikoko v Mokhatla* (n 6 above) (minority judgment of Mokgoro J) paras 68-69; *The Citizen 1978 (Pty) Ltd & Others v McBride* [2011] ZACC 11, Case CCT 23/10, 8 April 2011, http://www.saflii.org/za/cases/ZACC/2011/11.html (*McBride*) (minority judgment of Mogoeng J) para 217.

60 See eg R English '*Ubuntu*: The quest for an indigenous jurisprudence' (1996) 12 *South African Journal on Human Rights* 641; IJ Kroeze 'Doing things with values II: The case of *ubuntu*' (2002) *Stellenbosch Law Review* 252.

61 Arts 27-29 African Charter.

62 See the minority judgment of Ngcobo J in *Bhe & Others v Khayelitsha Magistrate & Others* 2005 1 SA 580 (CC) paras 163 & 166, where he explicitly links *ubuntu* to the duties in the African Charter. See also *Makwanyane* (n 4 above) (minority judgment of Mahomed J) para 263; *McBride* (n 59 above) (minority judgment of Mogoeng J) para 218. See also N Ahiauzu '*Ubuntu* and the obligation to obey the law' (2006) 37 *Cambrian Law Review* 17.

63 Kiwanuka (n 35 above) 82.

Kingdom, for instance, were so hostile to the notion of solidarity rights that they officially withdrew from UNESCO when Director-General M'Bow refused to relent on his campaign for a third generation of human rights, on the grounds that this initiative 'would give international legitimacy to abuses of individual rights ... justified by appealing to a supposedly higher or equally valid set of collective rights'.[64] These Western fears were unfounded, however, as the solidarity rights were conceived as comprehensive rights, with both individual and collective dimensions,[65] and were not to be wielded by the state against the people, but rather by the people against the state.[66] It must be remembered, though, that this happened during the height of the Cold War, when the United Kingdom and the United States were providing arms, investment and intelligence to the apartheid regime.[67]

I mention this example because apartheid provides an instructive analogy for the unique jurisprudential value of African humanism.[68] In so many ways, apartheid is the very antithesis of *ubuntu*. While apartheid literally means 'separateness', *ubuntu* emphasises 'togetherness', interdependence and community. While apartheid criminalised compassion and solidarity, *ubuntu* is defined by them. Apartheid effectively divorced rights from duties, reserving for white people a maximum of rights and a minimum of duties, while relegating black people to the opposite fate. Apartheid did not only strive to separate white South Africans from black South Africans, but indeed to sever South Africa from its own continent, to create an enclave of Western, Christian and capitalist 'civilisation'.[69] In order to sustain itself, the apartheid regime placed itself at the frontlines of the Cold War, involving itself and its citizens directly in the proxy conflicts on the continent, from South West Africa and Angola to Mozambique.[70]

After the dawn of democracy, therefore, the project of healing the divisions in South African society was also, in a strong sense, the project of healing the ideological divisions of the Cold War. Our Constitution had to accommodate and address these divisions, and still has to do so today, as our country remains deeply divided – politi-

64 As quoted in Alston (n 30 above) 280-281.

65 K Mbaye 'Introduction' in M Bedjaoui (ed) *International law: Achievements and prospects* (1993) 1052.

66 Crawford (n 36 above) 164.

67 J Barber *Mandela's world: The international dimension of South Africa's political revolution* (2004) 9-25.

68 See generally KD Kaunda 'Humanism and apartheid' (1993) 37 *Saint Louis University Law Journal* 835 and WP Nagan 'Africa's value debate: Kaunda on apartheid and African humanism' (1993) 37 *Saint Louis University Law Journal* 871.

69 See, eg, the speech by the architect of apartheid, HF Verwoerd, in which he heralded South Africa as 'unequivocally the symbol of anti-communism in Africa [and] a bastion in Africa for Christianity and the Western world', quoted in AM Chambati 'South Africa's foreign policy and the world' (1973) 3 *Zambezia* 92.

70 See Meredith (n 8 above) 316-319.

cally, economically and socially – embodying the frontier between the developed and developing worlds. As President Nelson Mandela predicted, 'as she battles to remake herself, South Africa will be like a microcosm of the new world striving to be born'.[71] In this context of vast disparities in development, the South African Constitutional Court has demonstrated the unique viability and value of *ubuntu* as a legal philosophy, in requiring meaningful mediation in the resolution of disputes between private landowners and homeless people dwelling on their property:[72]

> [The statute] expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern ... The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised, and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

In a similar sense, the colossal project of reconciling a deeply-divided world calls for compassion and co-responsibility on the part of all peoples, persons and corporations, rather than only states. The philosophy of African humanism, through the rights of solidarity, provides the possibility to adapt human rights theory to the task. Firstly, it explodes the binary fallacy of the Cold War that there is an absolute and irreconcilable election between individualist and communitarian legal philosophies. In the realm of human rights, as the Cold War intensified, the Western states clung to ICCPR, whereas the Eastern states clung to ICESCR. While the West rallied around capitalism, an economic philosophy sustained by competition, the East rallied around communism, an economic philosophy sustained by compulsion. And while the West advocated a theory of rights, emphasising liberty at the expense of equality, the East advocated a theory of duties, emphasising equality at the expense of liberty.[73] African states were expected, and induced through fear, force and corruption, to choose between the two.

African humanism, however, presented a third choice, and it harboured the unique jurisprudential potential to reconcile the rift between West and East. The rights of solidarity represented a theory of reciprocity, a reconciliation of rights and duties, with equal emphasis on liberty and equality. African humanism is neither a libertarian

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71 NR Mandela 'Nobel lecture', Oslo, Norway, 10 December 1993, http://nobelprize.org/nobel_prizes/peace/laureates/1993/mandela-lecture.html (accessed 16 June 2011).

72 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37.

73 See B Tyson & AA Said 'Human rights: A forgotten victim of the Cold War' (1993) 15 *Human Rights Quarterly* 589 594-596.

philosophy nor an egalitarian philosophy, but rather a *fraternitarian* philosophy, sustained by compassion, using fraternity or solidarity as a bridge between liberty and equality. Accordingly, in the South African Constitutional Court, Justice Albie Sachs has stated as follows:[74]

> *Ubuntu – botho* is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture. Historically, it was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised society to overcome and transcend the divisions of the past. *In present day terms it has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values.*

Although the Cold War has officially ended, the glaring gap between the developed and developing worlds still remains, as an 'explosive remnant of war', to borrow a phrase from international humanitarian law.[75] The brief intervening period between the West's crusade against communism and its current crusade against independent Islam (under the title of the 'war on terror') was marked by an unprecedented recognition of the value of peoples' rights. For instance, successive versions of a Declaration on the Right of Peoples to Peace were met with consistent and considerable abstention by Western states in the UN General Assembly in 1984,[76] 1985,[77] 1986[78] and 1988,[79] but just after the close of the Cold War, in 1990, the Resolution on the Implementation of the Declaration on the Right of Peoples to Peace was adopted by consensus.[80] However, in 2002, just after the commencement of the war on terror, the Resolution on the Promotion of the Right of Peoples to Peace was opposed by 54 votes,[81] invariably those of Western states and their clients.

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74 *Dikoko v Mokhatla* (n 6 above) (minority judgment of Sachs J) para 113 (my emphasis).

75 See eg Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention) 28 November 2003.

76 Resolution 39/11: Declaration on the Right of Peoples to Peace, UNGA (by vote of 92-0-34) 1984, http://www.un.org/depts/dhl/resguide/r39.htm (accessed 16 June 2011).

77 Resolution 40/11: Right of Peoples to Peace, UNGA (by vote of 109-0-29) 1985, http://www.un.org/depts/dhl/resguide/r40.htm (accessed 16 June 2011).

78 Resolution 41/10: Right of Peoples to Peace, UNGA (by vote of 104-0-33) 1986, http://www.un.org/depts/dhl/resguide/r41.htm (accessed 16 June 2011).

79 Resolution 43/22: Right of Peoples to Peace, UNGA (by vote of 118-0-29) 1988, http://www.un.org/Depts/dhl/resguide/r43.htm (accessed 16 June 2011).

80 Resolution 45/14: Implementation of the Declaration on the Right of Peoples to Peace, UNGA (by consensus) 1990, http://www.un.org/Depts/dhl/resguide/r45.htm (accessed 16 June 2011).

81 Resolution 57/216: Promotion of the Right of Peoples to Peace, UNGA (by vote of 116-53-14) 2002, http://www.un.org/depts/dhl/resguide/r57.htm (accessed 16 June 2011).

We see a similar pattern in respect of the right to development. In the UN General Assembly in 1986, the Declaration on the Right to Development met with a vote of opposition from the United States and abstention from eight Western and West-aligned states, including West Germany, Israel, Japan and the United Kingdom.[82] By contrast, in 1990, a Resolution on the Right to Development was adopted by consensus.[83] But in December 2001, a further Resolution on the Right to Development was greeted with four votes of opposition (by Denmark, Israel, Japan and the United States) and abstention from 44 Western states and client states.[84]

It appears unlikely, therefore, that our deeply-divided world will quickly come to sufficient consensus about the rights of solidarity to adopt a third covenant and to complete the project of the International Bill of Human Rights.

5 Conclusion: A call to compassion

We, as Africans, already have a third covenant: a legally-binding Covenant of Compassion, which recognises our rights (and corresponding responsibilities), as peoples, to existence, equality, self-determination, sovereignty over our natural resources, peace and security, development and the environment. In this article, I have tried to answer the call by President Nelson Mandela[85]

> to use our country's unique and painful experience to demonstrate, in practice, that the normal condition for human existence is democracy, justice, peace, non-racism, non-sexism, prosperity for everybody, a healthy environment and equality and solidarity among the peoples.

We must begin an inclusive conversation on the contents and consequences of our solidarity rights, and progressively demand their enjoyment and enforcement. We must also seek to enforce them in creative ways. Although the doors to the African Court on Human and Peoples' Rights may be closed to us,[86] we must begin to invoke our rights of solidarity in our national and regional courts and tribunals. Although the rights of solidarity have been invoked against states

82 Resolution 41/128: Declaration on the Right to Development, UNGA (by vote of 146-1-8) 1986, available at http://www.un.org/depts/dhl/resguide/r41.htm (accessed 16 June 2011).

83 Resolution 45/97: The Right to Development, UNGA (by consensus) 14 December 1990, http://www.un.org/Depts/dhl/resguide/r45.htm (accessed 16 June 2011).

84 Resolution 56/150: The Right to Development, UNGA (by vote of 123-4-44) 19 December 2001, http://www.un.org/depts/dhl/resguide/r56.htm (accessed 16 June 2011).

85 Mandela (n 71 above).

86 See *Yogogombaye v Senegal*, African Court on Human and Peoples' Rights, Application 001/2008, Judgment 15 December 2009.

before the African Commission,[87] we must begin to enforce them against powerful individuals and corporations as well,[88] wherein lies their unique utility. More fundamentally, we must begin to engender a culture of compassion. In our boardrooms, courtrooms and classrooms, we must infuse our public spaces with a spirit of solidarity. Only when we foster a culture of continental solidarity, can we truly begin to pursue the realisation of the rights of all our peoples.

87 See *Democratic Republic of the Congo v Burundi, Rwanda & Uganda* (2004) AHRLR 19 (ACHPR 2003); *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case); *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009); *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000); *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000); *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995).

88 See JC Nwobike 'The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*' (2004-2005) 1 *African Journal of Legal Studies* 143-144.

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Unique in international human rights law: Article 20(2) and the right to resist in the African Charter on Human and Peoples' Rights

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Summary

This article analyses article 20(2) of the African Charter on Human and Peoples' Rights codifying the human right to resist, a unique provision without equivalent in other international treaties, affirming that '[c]olonised or oppressed peoples' have a right 'to free themselves from the bonds of domination by resorting to any means recognised by the international community'. It proposes a two-part test which assesses the grounds for a claim under article 20(2) based on 'oppression' and the scope of consequently permissible means separately, incorporating a consideration of necessity and proportionality. Applying the primary 'grounds' test, positive findings are possible in more than foreign invasion and occupation cases. Peoples facing massive violations amounting to crimes against humanity or genocide, coups d'état *or other unconstitutional rule could qualify. Provided all other required conditions are convincingly established, minority peoples facing systematic discrimination and exclusion could also qualify, as could majorities or minorities in situations of foreign economic domination amounting to an interference with the right to self-determination. Systematic violations of economic and social rights of either a majority or a minority people could also produce a valid claim to a right to resist economic 'oppression'. Regarding the secondary 'means' test, adjudicators are constrained by the lack of clear*

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permissions in established customary law on the right to employ armed force to resist domestic oppression. For otherwise illegal means short of armed force – those peaceful and other means that are at the illegal end of the spectrum of tactics and therefore not generally authorised due to ordinary limitations under the lex generalis *– the gaps in the law resulting from both 'constructive ambiguity' and limited findings in the universal system may provide greater latitude. These create openings for fresh African construction, particularly as to exceptionally authorised peaceful but otherwise illegal means.*

1 Introduction

Three decades ago, the African Charter on Human and Peoples' Rights (African Charter) was the first international human rights treaty to codify the right to resist, in article 20(2). It states that '[c]olonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community'.[1] Today this provision continues to enjoy a unique status in international law as the sole express right to resist 'oppression'. However, despite the description of the right to resist as the 'supreme' human right by one of the foremost authorities of the discipline,[2] specialists have to date largely neglected article 20(2), and consequently its interpretation remains challenging in view of the ongoing lack of a clear evaluative framework. It is precisely because it represents a significant departure from the approach of other main human rights treaties, but also because the right to resist remains generally ignored or misunderstood by international lawyers and advocates, that article 20(2) deserves further exploration and discussion.

Far from being obsolete in the post-colonial and post-apartheid era, the many contemporary African conflicts, in particular the recent popular revolts in North African states that are parties to the African Charter, make clarification of the application and scope of article 20(2) more relevant and more urgent than ever. Moreover, the advent of a new recommendation to the United Nations (UN) Human Rights Council for inclusion of an express provision on the right to resist oppression within the context of a proposed UN declaration on the right of peoples to peace[3] provides a fresh opportunity for timely international leadership by Africans on this important human rights concept.

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1 Art 20(2) African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, OAU Doc CAB/LEG/67/3/Rev.5 (1982); reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29.

2 H Lauterpacht *International law and human rights* (1950) 116.

3 UN Human Rights Council 'Progress report of the Human Rights Council Advisory Committee on the right of peoples to peace' 1 April 2011, UN Doc A/HRC/17/39 (2011) 9-10 paras 35-37.

After providing a brief background on the pedigree, content and status in positive law of the human right to resist, this article reviews the unique elements of article 20(2) as well as its ambiguities. It identifies obstacles to its interpretation and highlights the major legal questions that the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights and later the African Court of Justice, Human and Peoples' Rights (African Court) will have to address as the jurisprudence of article 20(2) develops, suggesting an approach in the form of a two-part test. It argues that this provision of the African Charter poses a necessary challenge to the otherwise predominant Western 'doctrine of disavowal' of the right to resist,[4] which holds that, as such, this right either does not, cannot or should not exist, and that, regardless of context, only a lesser right to peaceful assembly and protest constitutes a lawful human rights defence. In this way the Charter contains the framework for a significant advancement not only for human rights in Africa, but potentially well beyond its borders. While acknowledging the associated challenges, it concludes by setting out a series of opportunities for human rights and human security presented by article 20(2), highlighting its possible utility in contemporary conditions.

2 Background: The human right to resist

Article 20(2) of the African Charter may be unique, but it does not exist in a vacuum. Rather, it is a significant progressive legal development that should be understood in its proper context as to the right's pedigree, content and status in positive law.

2.1 Pedigree

The idea that human beings have a lawful right to resist various forms of what we now understand as human rights violations is ancient, intercultural, pan-ideological, and profoundly constitutional. It shares a common conceptual origin with human rights itself.[5] Its antecedent norms can be found in Athenian and Roman, Confucian and Islamic laws and doctrines, as well as in a distinctive African tradition.[6]

4 See S Murphy 'The "right to resist" reconsidered' in DP Keane & Y McDermott (eds) *The challenge of human rights: Past, present and future* (forthcoming 2012).

5 Lauterpacht (n 2 above) 73-126 326.

6 Eg the Athenian doctrine of tyrannicide, found in Solon's Law and in the Decrees of Eucrates and Demophantus, transposed into Roman law; see JF McGlew *Tyranny and political culture in ancient Greece* (1993) 88 185-187; O Jászi & JD Lewis *Against the tyrant: The tradition and theory of tyrannicide* (1957); the Confucian doctrine of tyrannicide according to Mencius; see *Mencius* (trans) DC Lau (2003) bk 1 pt B:8, bk II pt B:14, bk VII pt A: 31 and CS Lo 'Human rights in the Chinese tradition' in UNESCO 'Human rights: Comments and interpretations' (July 1948) UNESCO Doc PHS/3(rev) 25 185-186; and the Islamic doctrine of *jihad* in *The Qur'an* trans

Its philosophical basis has been advocated on opposite sides of the ideological divide, from liberal democratic to Marxist theory.[7] Its compatibility with the rule of law both internationally and domestically is confirmed by the earliest proponents of international law[8] and its codification in the Magna Carta.[9] Indeed, the 'right to resist oppression' was well-established enough as a legal concept to be included in both the Humphrey and Cassin drafts of the Universal Declaration of Human Rights (Universal Declaration).[10]

2.2 Content

Despite its impressive pedigree, the right to resist remains controversial. There is no agreement among contemporary legal scholars that it even exists, and no consensus on its definition even among its advocates. Elements of a definition advanced by Honoré provide the following useful fundamentals: that given certain conditions, there is an exceptional individual and collective human right to commit otherwise unlawful acts as a means to resist unlawful use or other abuse of power.[11] The right to resist is therefore a secondary right that engages only as a consequence of primary right violations, and it is a 'self-help' form of remedy or method of enforcement of guarantees.[12] It concerns a broad

MAS Abdel Haleem (2004) 4:75 with explanation at xxii. Likewise, in pre-colonial Africa, Ashanti kings were 'ritually warned against dictatorship and abuse of office' according to UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 15. See also CH Heyns 'A "struggle" approach to human rights' in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: A reader* (2006) 28 on the analogous traditional norms in African customary law.

7 Eg Locke's 'doctrine of the lawfulness of resisting all unlawful exercises of power'; J Locke *Two treatises of government* P Haslett (ed) (1988), esp 'Of tyranny' and 'Of the dissolution of government' *Second treatise* ch XIX 415 para 226; ch XIX 427-428 para 243; ch XVIII 402-403 paras 206-207.

8 Eg H Grotius *The law of war and peace: Selections from* De jure belli ac pacis (trans) WSM Knight (1939) bk I ch IV paras i3, vii4, viii4; bk II ch XXV para viii2; E de Vattel *The law of nations: Or, principles of the law of nature applied to the conduct and affairs of nations and sovereigns* trans CG Fenwick (1916) bk I ch IV para 54.

9 *Magna Carta* (1215) clause 61.

10 'Draft outline of an International Bill of Human Rights (prepared by the Division of Human Rights of the Secretariat)' 1947 *UN Yearbook of Human Rights* 484 (Humphrey draft) art 29; 'Suggestions submitted by the Republic of France for articles of the International Declaration of Human Rights' 1947 *UN Yearbook of Human Rights* 495-498 (Cassin draft) art 25.

11 T Honoré 'The right to rebel' (1988) 8 *Oxford Journal of Legal Studies* 34 35-36.

12 A Eide 'The right to oppose violations of human rights: Basis, conditions and limitations' in UNESCO *Violations of human rights: Possible rights of recourse and forms of resistance* (1984) 44-53; TV Minh 'Political and juridical sanctions against violations of human rights' UNESCO (above) 157 163; C Tomuschat 'The right of resistance and human rights,' UNESCO (above) 20 24; Honoré (n 11 above) 38-40.

spectrum of illegal means from the peaceful to the forceful.[13] Thus, related sub-rights to opposition, disobedience, rebellion and revolution – while narrower and related to more specific acts or conditions – may be included under its umbrella, in the manner of the right to a fair trial with its various elements. However, in order to be consistent with international human rights law, the right must be limited and conditional and the objectives and conduct of the resistance must be human rights compliant in order to be lawful.[14]

More recently, the UN Human Rights Council Advisory Committee advanced this formulation:[15]

1 All peoples and individuals have the right to resist and oppose oppressive colonial or alien domination that constitutes a flagrant violation of their human rights, including the right of peoples to self-determination, in accordance with international law.
2 All individuals have the right to oppose war crimes, genocide, aggression, apartheid and crimes against humanity, [or] violations of other universally recognised human rights ...

If ultimately agreed by the UN Human Rights Council,[16] this would represent the most detailed statement of how the right is understood in the universal system, even though as a declaration the instrument itself would not be binding on states.

2.3 Status in positive law

Despite the controversy over its existence, the right to resist is not purely theoretical. Rather, it has a basis in both constitutional and international positive law. However, its international codification is weak compared to its domestic codification. Its recognition and protection in international human rights law is notably thin compared to that afforded many other fundamental rights, and what protections do exist reflect a north-south divide in perspective as to whether the right is legitimate.[17]

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13 Eide (n 12 above) 54; Minh (n 12 above) 161-162; Tomuschat (n 12 above) 25; RE Schwartz 'Chaos, oppression, and rebellion: The use of self-help to secure individual rights under international law' (1994) 12 *Boston University International Law Journal* 255 256-257.

14 Eide (n 12 above) 34-35 54-58 60-63; Tomuschat (n 12 above) 19 27 30; JJ Paust 'The human right to participate in armed revolution and related forms of social violence: testing the limits of permissibility' (1983) 32 *Emory Law Journal* 545 569; A Kaufmann 'Small scale right to resist' (1985-1986) 21 *New England Law Review* 571 574; Honoré (n 11 above) 43 52; Schwartz (n 13 above) 265-269 273-276 278-284.

15 n 3 above, 10 sec D 'proposed standards'.

16 UN Human Rights Council 'Resolution on Promotion of the Right of Peoples to Peace' 10 June 2011 UN Doc A/HRC/17/L.23 (2011) paras 14-17 deferred substantive consideration of the proposed draft text until 2012.

17 Murphy (n 4 above).

2.3.1 Constitutional law

The right to resist has been codified in numerous constitutions, using a variety of formulations as to its scope, in four distinct 'waves': republican, anti-fascist, anti-colonial and anti-soviet.[18] It remains to be seen whether there will be a fifth wave, post-'Arab Awakening'. A significant number of the set are in African post-colonial constitutions.[19] Like others of the post-colonial subset, these tend to be anti-invasion and anti-*coup* provisions conferring a relatively narrow right to resist unconstitutional seizure of power,[20] often using a 'right and duty' model or in some cases a more oblique absolution from the obligation of obedience. However, a few of the African formulations and many in the other three subsets provide a more general right to resist human rights violations where alternative remedies are not otherwise available.[21]

2.3.2 Customary international law

The right to resist is also recognised to some extent in customary international law, although its scope is unclear. The Universal Declaration, which to some extent codifies or at least provides evidence of customary international law, contains in paragraph 3 of its Preamble a reference to resistance as an outcome of tyranny, oppression and human rights violations.[22] While some commentators maintain that this acknowledges a customary right to resist oppression, its preambular placement and indirect formulation are ostensibly those of a non-right, not a right, and indeed the express right proposals debated in the drafting process

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18 As above.

19 According to Heyns & Kaguongo, as of 2006, 16 African constitutions protected this right, as follows: Benin (arts 19 & 66); Burkina Faso (art 167); Cameroon (Preamble); Cape Verde (art 19); Chad (Preamble); Congo (art 10); Democratic Republic of Congo (art 28); The Gambia (art 6); Ghana (art 3); Guinea (art 19); Mali (art 121); Mozambique (art 80); Niger (art 13); Rwanda (art 48); Togo (arts 21, 45 & 150); and Uganda (arts 3(5) & (6)). C Heyns & W Kaguongo 'Constitutional human rights law in Africa' (2006) 22 *South African Journal on Human Rights* 673 678 fn 20. It is not, however, clear that the Cameroon and Guinea provisions cited above should be included in this list. In addition, the correct provision numbers for the Constitution of the Republic of Uganda are as in n 20 below. In subsequent developments, at the time of writing the Transitional Constitution of the Republic of South Sudan (2011) contains a duty-only provision at art 4(3) modified from the Interim Constitution of Southern Sudan (2005)'s binary right/duty to resist at art 4(2). The Constitution of the Republic of Kenya (2010) does not contain such a provision.

20 Eg Constitution of the Republic of Honduras (1982) art 3; Constitution of the Republic of Uganda (1995) arts 3(4) & 3(5).

21 Eg American Declaration of Independence (1776) Preamble para 2; Constitution of the Portuguese Republic (1976) art 21; Constitution of the Republic of Cape Verde (1992) art 19; Constitution of Slovakia (1992) art 32.

22 'Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.' Universal Declaration of Human Rights, adopted 10 December 1948, GA Res 217A (III) UN Doc A/810 71 (1948) (Universal Declaration) Preamble para 3.

were ultimately withdrawn without a vote.[23] So the position of the right to resist in the Universal Declaration is ambiguous at best.

Elsewhere, UN General Assembly Resolution 2625, which also provides evidence of customary international law, enshrines the principle that a people, when forcibly deprived of its right to self-determination, has a right to international assistance in its resistance and thus contains an implied right to resist.[24] It is now considered settled that this applies to peoples resisting foreign invasion and occupation, colonisation and racist regimes,[25] otherwise known as situations demanding 'external self-determination'.[26] However, while there may well be room within the letter of the law,[27] it is far less clear whether the same right also applies to peoples resisting undemocratic, unconstitutional, tyrannical, or otherwise oppressive, corrupt or unresponsive domestic regimes, as situations demanding 'internal self-determination'.[28]

2.3.3 Treaty law

The apparent ambiguities of the Universal Declaration and UN General Assembly Resolution 2625 are not clarified by the treaties of the universal system, where there is still no express provision on the right to resist, but neither is there a clear prohibition. Some have advanced theories of constructive ambiguity, maintaining that the International Bill of Rights contains an implied or latent right to resist derived from common article 1 on the right to self-determination in the International Covenant on Civil and Political Rights (ICCPR) and International Cov-

23 See the accounts in J Morsink 'The philosophy of the Universal Declaration' (1984) 6 *Human Rights Quarterly* 309 322-325; J Morsink *The Universal Declaration of Human Rights: Origins, drafting and intent* (1999) 308-312.

24 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) UN Doc A/5217 (1970) 121 (UNGA Res 2625). See principle 1 para 7; principle 3 para 3; and especially principle 5 paras 5 & 7.

25 Conclusions affirming the right to resist appear in the respective reports of the former UN Secretary-General Kofi Annan, Special Rapporteur on Palestine, Richard Falk, and Judge Richard Goldstone. Report of the UN Secretary-General to the UN General Assembly 'In larger freedom: Towards development, security and human rights for all' 21 March 2005, UN Doc A/59/2005 26 para B91; UN Human Rights Council 'Human rights situation in Palestine and other Occupied Arab Territories: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967' 11 February 2009, UN Doc A/HRC/10/20 18 paras 40-41; UN Human Rights Council 'Human rights situation in Palestine and other Occupied Arab Territories: Report of the United Nations fact finding mission on the Gaza conflict' 15 September 2009, UN Doc A/HRC/12/48 520 pt 5 XXX A para 1672.

26 See discussion in F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 230-236.

27 Specifically at principle 5 para 7 (n 24 above).

28 See discussion in Ouguergouz (n 26 above) 230-236.

enant on Economic, Social and Cultural Rights (ICESCR),[29] when read together with article 25 on the right to political participation and the right to an effective remedy at article 2(3)(a) of ICCPR.[30] While such theories may or may not be viable, they have not been tested at the UN Human Rights Committee or International Court of Justice so should at least not be ruled out.

Meanwhile, the regional human rights systems take divergent approaches. Whereas a clear doctrine of disavowal of the right to resist is discernible in the European and Inter-American systems, which do not recognise the right to resist,[31] the African Charter in contrast is the first international human rights instrument to actually codify it in an express provision. Article 20 firstly affirms in subsection (1) that all 'peoples' have 'the unquestionable and inalienable right to self-determination' including the right to 'freely determine their political status and ... pursue their economic and social development according to the policy they have freely chosen'.[32] In this context, as set out above, article 20(2) of the African Charter effectively asserts a collective right to resistance not only against colonisation, but also other unspecified forms of oppression.[33] Article 20(3) goes even further, providing that '[a]ll peoples shall have the right to the assistance of the states parties ... in their liberation struggle against foreign domination, be it political, economic or cultural'.[34] This is one of only two such provisions on the right to resist in international human rights treaty law, the other being a narrower 'right to resist foreign occupation', now codified as article 2(4) of the newly-operative Arab Charter on Human Rights.[35] It is clear

29 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' International Covenant on Civil and Political Rights adopted 16 December 1966, entered into force 23 March 1976 GA Res 2200A (XXI) UN Doc A/6316 (1966) (ICCPR) art 1; International Covenant on Economic, Social and Cultural Rights adopted 16 December 1966 entered into force 3 January 1976, GA Res 2200A (XXI) UN Doc A/6316 (1966) art 1.

30 'Every citizen shall have the right and the opportunity, without [discrimination] and without unreasonable restrictions ... [t]o take part in the conduct of public affairs, directly or through freely chosen representatives ... [t]o vote and to be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.' ICCPR (n 29 above) art 25; 'Each State Party to the present Covenant undertakes ... [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.' ICCPR (n 29 above) art 2(3)(a). See M Nowak *UN Covenant on Civil and Political Rights – CCPR commentary* (1993) 23 para 34; A Rosas 'Article 21' in G Alfredsson & A Eide (eds) *The Universal Declaration of Human Rights: A common standard of achievement* (1999) 432 434 441-442 449 451.

31 Murphy (n 4 above).

32 Art 20(1) African Charter.

33 Art 20(2) African Charter.

34 Art 20(3) African Charter.

35 Art 2(4) Arab Charter on Human Rights, League of Arab States adopted 22 May 2004, entered into force 15 March 2008.

that these African and Arab provisions were adopted principally as a reflection of profound regional commitment to prevent recurrences of gross human rights violations related to colonisation as well as to stop those ongoing at time of adoption, including in particular the apartheid regime in South Africa and the occupation of Palestine, and perhaps also to honour the contribution of the African and Arab national liberation movements to the regional advancement of human rights. It is equally clear that the European and Inter-American approaches instead break with or draw a line under their common revolutionary republican, and their respective anti-fascist and anti-colonial resistance pasts, despite the comparable contribution made by these movements to the advancement of human rights in these regions.

Thus, while it draws on a long and distinguished tradition, and furthermore sits compatibly with the African constitutional landscape, article 20(2) remains unique in international law as a consequence of its specific elements. These same features also give rise to certain obstacles to interpretation and a series of as yet unresolved legal questions, as set out below.

3 Article 20(2): Unique elements, obstacles to interpretation or unresolved legal questions and a possible test

Since the UN Human Rights Council has now been formally advised that the right to resist oppression should be included in a proposed UN declaration on the right of peoples to peace,[36] the time is opportune not only to examine what this right really means in the African context, but also for the African Union (AU), African Commission and African Court in particular to develop and clarify their views on article 20(2), make them known and thus have a further influence on the development of international human rights law in this area.

3.1 Unique elements

There are two important elements to the right to resist in article 20(2) of the African Charter that distinguish it from the express, or for that matter implied, rights to resist elsewhere in international law. Firstly, as noted above, article 20(2) does not limit the right to 'colonised' or 'occupied' peoples or those living under 'racist regimes' only, but specifically and clearly extends it to all 'oppressed' peoples in Africa, which is a much broader formulation. In this sense, it is closer to the tradi-

36 UN Human Rights Council Advisory Committee 'Progress report on the right of peoples to peace' 22 December 2010 UN Doc/A/HRC/AC/6/CRP.3 para 22(d).

tional 'right to resist oppression and tyranny'[37] that is absent from the other international and regional treaties and upon which customary international law is presently unclear. Secondly, article 20(2) provides that those engaged in resistance have just recourse to 'any means'. This is also broader than the apparently exclusively peaceful means authorised by the European and Inter-American regional systems and at least favoured by the UN system human rights treaties. However, such means must be 'recognised by the international community'. This has the positive effect of ensuring that the right is exercised in a manner generally consistent with international human rights law, international humanitarian law and international criminal law as they stand at any given time. Unfortunately, it also makes the entire provision dependent on the status of the right to resist elsewhere, and thus impossible to interpret from the Charter alone.

These two elements ensure that article 20(2) is not obsolete in a contemporary context that has changed dramatically in some ways since the provision was originally drafted and agreed upon in the early 1980s. Rather, in the post-colonial, post-apartheid era it continues to apply not only to cases of foreign intervention in other forms, but also to the now widespread 'internal self-determination' questions that plague both majorities and minorities in many African countries. This has been emphasised by Ouguergouz, the one commentator who has treated the issue in detail.[38] Indeed, the account of the Secretary-General of the Organisation for African Unity (OAU) at the time of drafting confirms that the African Charter as a whole was intended not only to ensure against recurrence of colonisation or other forms of foreign domination and to bolster the fight against the aggressive apartheid regime, but also to address the proliferation of post-colonial human rights violating regimes and African dictatorships.[39]

3.2 Impact of the dependent formula on interpretation

The African Charter provisions generally provide ample room for dynamic interpretation, both as a matter of intent and net effect of the simplicity bordering on vagueness of their framing and also because the 'incomplete and cursory' *travaux préparatoires* provide little or no interpretive guidance.[40] While there are undoubted potential

37 The phrase used in art 25 of the Cassin Draft of the Universal Declaration; see n 10 above.

38 Ouguergouz (n 26 above) 203-269, especially 261-269.

39 E Kodjo 'The African Charter on Human and Peoples' Rights' (1990) 11 *Human Rights Law Journal* 271 272-274 281-282.

40 F Viljoen 'The African Charter on Human and Peoples' Rights: The *travaux préparatoires* in the light of subsequent practice' (2004) 25 *Human Rights Law Journal* 315-316 325. Viljoen compiles and compares the few available records on the substantive provisions as research complementary to BG Ramcharan 'The *travaux préparatoires* of the African Commission on Human and Peoples' Rights' (1992) 13 *Human Rights Law Journal* 307. See also NS Rembe *The system of protection of human rights under the African Charter on Human and Peoples' Rights: Problems and prospects* (1991) 4-5.

interpretative advantages to these ambiguities, the available latitude is not unlimited.

In the case of article 20(2) determinations, the adjudicators may be constrained by the interpretive obstacle imposed by its dependent formula as to authorised means of resistance, which must be considered in every individual case. To decode this they will need in the first instance to abide by articles 60 and 61 of the African Charter as to applicable principles, standards and sources of interpretation.[41] Even if, in the opinion of the adjudicators, means additional to those authorised by these sources of international law would be justified on particular grounds, such as necessity, as a consequence of contextual conditions and thresholds met, it would appear that they would not have the discretion to make a recommendation or judgment to this effect. On this one particular point, article 20(2) is not remotely ambiguous. Even if the net effect of the formulation is positive, as it ensures that the interpretation of the provision can continue to keep stride with developments elsewhere in public international law over time, this is potentially problematic in the short term because the law elsewhere remains mostly vague.

Particularly as regards mid-spectrum cases – where the means employed are neither entirely peaceful nor involve armed force (that is, physical confrontation or property destruction without munitions) – and 'internal' self-determination cases involving violations by and resistance to domestic regimes, the African Commission, African Court and others will be at a disadvantage and may not be able to take a fully definitive position until normative and legal clarification takes place outside the African system. In the meantime, as discussed further below, despite the interpretive obstacle created by the dependent formula, there may still be sufficient flexibility to enable determinations not only on situations involving forcible deprivation of 'external' self-determination rights, but also those where exclusively peaceful means are used even if these are otherwise 'illegal', such as civil disobedience. So the dependent formula does not completely paralyse the application of the provision. However, there are still a number of other basic

41 Art 60 African Charter: 'The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.' Art 61 African Charter: 'The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.'

unresolved legal questions with the potential to further shape interpretation, as follows.

3.3 Scope of potential restrictions internal to the African Charter

Apart from the constraints imposed by the dependent formulation, the African Commission, African Court and others will need to take account of other restrictions internal to the African Charter in their analysis. These vary in their potential scope and impact.

Firstly, like all other Charter provisions, article 20(2) is not subject to derogation in times of emergency. This is particularly important because the right to resist oppression in particular can be most urgently needed under such conditions and any state right of derogation would essentially amount to a direct negation of this right. Moreover, unlike the other political rights provisions, article 20(2) is not subject to any additional internal 'claw-back' clause provided all its elements are met, including the restriction requiring international authorisation of the means employed. This is crucial for the same reason. However, two other separate provisions of the African Charter may effectively impose limitations on article 20(2) in the form of possibly, though not inherently, conflicting rights.

Article 27(2) requires exercise of this right 'with due regard' not only to the rights of others, but also collective security and common interest, although the African Commission to date has insisted that any limitations deriving from this clause must be necessary and proportionate and also not negate the right in question.[42] This leaves adjudicators room for thoughtful construction and balancing or weighting of competing rights and other considerations.

The possible article 27(2) restriction becomes particularly relevant in view of potential limitations on the right deriving from the article 23 right to peace,[43] including the article 23(2) prohibitions on subversion against another state.[44] Indeed, the African Commission has already found violations of article 23 linked to actions contrary to customary law on the right to self-determination and the prohibition on intervention in the form of UN General Assembly Resolutions 2625 and 3314[45] and the UN and OAU

42 *Nigeria Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 65-70.

43 Art 23(1) African Charter: 'All peoples shall have the right to national and international peace and security.'

44 Art 23(2) African Charter: 'For the purpose of strengthening peace, solidarity and friendly relations, states parties to the present Charter shall ensure that: (a) any individual enjoying the right of asylum ... shall not engage in subversive activities against his country of origin or any other state party to the present Charter; (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other state party to the present Charter.'

45 Definition of Aggression UNGA Res 3314 (XXIX) (17 December 1974) UN Doc A/9619 and Corr 1.

Charters,[46] in the form of unauthorised state interference in civil conflict by illegal support for local anti-government rebels.[47] This indicates that the African Commission is unlikely to endorse or otherwise permit the exercise or proposed exercise of the right to resist in article 20(2) or the right to assistance in article 20(3) in any manner contrary to established customary international law relevant to article 23.[48] However, potential article 23 limitations, including those based on article 23(2), should be treated with caution. Ouguergouz warns against the potential for misconstruction of the African Charter through an oversimplified understanding of the right to peace because it actually 'does not condemn all use of violence which [under general principles of international law] ... remains legitimate in situations of self-defence and whenever a people seeks to escape from servitude or oppression', therefore article 23(2) must be read 'in the light of article 20(2)' and not the reverse.[49] Another point to consider is that the reference to 'national' peace in article 23(1) means that 'both the people of a state taken as a whole, and its different ... components taken individually, have the right to peace and security domestically'.[50] Again, this must be construed in a manner consistent with the long-established legal concept of respect for human rights in general and especially self-determination rights as a precondition to peace, as reflected in the Universal Declaration's Preamble and article 28 on the right to a human rights-compliant social and international order.[51] In other words, a well-regulated and responsibly-exercised right to resist could even under certain conditions actually be necessary for the realisation of the right to peace in the medium to longer term, or else the only available form of effective remedy for violations of this right in the short term. The African colonial experience clearly demonstrates this. Equally, its post-colonial history is replete with examples of the opposite: the dangers of unregulated and thus undifferentiated resort to

46 Charter of the United Nations adopted 26 June 1945, entered into force 24 October 1945, as amended by UNGA Res 1991 (XVIII) of 17 December 1963 entered into force 31 August 1965, 557 *UN Treaty Series* 143; 2101 of 20 December 1965 entered into force 12 June 1968, 638 *UN Treaty Series* 308; and 2847 (XXVI) of 20 December 1971 entered into force 24 September 1973, 892 *UN Treaty Series* 119 (UN Charter) art 2(4); Charter of the Organisation of African Unity entered into force 13 September 1963, 479 *UN Treaty Series* 39 (OAU Charter) art 3.

47 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) paras 76-77.

48 In addition, Umozurike has noted a general preference for reconciliatory approaches rooted in African traditions of dispute settlement, which are also bound to influence recommendations, even in the event of positive findings on art 20(2). See Umozurike (n 6 above) 92.

49 Ouguergouz (n 26 above) 345, esp fn 1211.

50 Ouguergouz (n 26 above) 353. That the art 23 right to peace is effectively a right of peoples against states is emphasised in C Baldwin & C Morel 'Group rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 279-282.

51 Ouguergouz (n 26 above) 334-335.

force by rebel groups and tragic outcomes arising from claims to a right to resist that would be invalid under the African Charter's framework. So, while articles 27(2) and 23 will need to be taken into account in the adjudication of any future article 20(2) claims and particularly any article 20(3) claims consequently arising, it is not the case that these two articles inherently trump article 20(2) claimants. Significantly, as stated above, this view is apparently shared by the UN Human Rights Council's Advisory Committee.

3.4 Implications of the '*Katanga* test', the *Jawara* findings and remaining ambiguities post-*Gunme*

Since the right to resist is a secondary right akin to the right to an effective remedy, article 20(2) could be litigated in at least two ways. The issue could be raised concurrently with or as part of a broader case regarding violations of primary rights, seeking affirmation that other forms of remedy are not available or unlikely to succeed, thereby authorising resort to the exceptional secondary right for the purposes of primary rights enforcement. On a practical level, a finding validating a claim to this secondary right could act as a deterrent to a regime, a form of 'cease and desist' with a view to encouraging de-escalation, negotiation or other positive engagement on the part of a state. Alternatively, a consecutive complaint could be raised regarding a violation of the secondary right itself, separate from but following findings on the primary violation, concerning the validity of specific laws or prosecutions, or challenging obstructions or failures to assist by other states. Despite these possibilities, article 20(2) has not yet been the direct subject of a complaint to the African Commission, nor the African Court.[52] Nevertheless, recent African Commission case law sheds some light in the form of three key cases that include substantive findings directly relevant to some of the legal questions that will eventually be raised by article 20(2). These are *Katangese Peoples' Congress v Zaire* (*Katanga* case),[53] *Jawara v The*

52 At the time of writing, decisions of the African Commission on individual communications were only available up to the 28th Activity Report covering the period to July 2010.

53 *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995). The African Commission found no merit in the claim to a right to self-determination of the 'Katangese people' under art 20(1) and an alleged consequent right to recognition of the claimant organisation as a national liberation movement and to assistance in their secession bid under art 20(3), as the claimant failed to adduce any evidence of the status of the Katangese as a 'people' within the meaning of the African Charter, and to provide further evidence establishing their exclusion from the political process.

Gambia (*Jawara* case)[54] and *Gunme and Others v Cameroon* (*Gunme* case),[55] which contains the first direct reference to article 20(2).

The chief significance of the *Gunme* case for consideration of article 20(2) claims is that it addresses the first hurdle in determining who is potentially able to avail of the article 20(2) right: Who, by definition, is a 'people' for the purposes of Charter rights? While acknowledging that the concept is not defined elsewhere under international law and that the African Commission has not previously defined the term,[56] the Commission holds that collective rights in general – therefore potentially including the article 20(2) right to resist – can at least in theory be exercised by 'a people bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities or other bonds'.[57] Importantly, a claim to be a 'people' need not require manifestation of all, but rather only some of the 'identified attributes', and a people need not necessarily be ethnically or otherwise anthropologically distinct to qualify.[58] Thus, the Commission has adopted a very broad and inclusive definition as regards potentially qualifying subgroups, particularly by way of ideological and economic identity and the totally open category of 'affinities or other bonds'. In addition, the Commission holds that the principles of sovereignty and territorial integrity do not provide states with an absolute shield from such claims. Instead, states have an obligation to address them, using African or other international dispute resolution mechanisms if necessary.[59]

Gunme also establishes a form of necessity condition relevant to article 20(2) by way of affirming the *Katanga* case requirement of a prior or concomitant finding of a violation of the article 13 right to political participation.[60] This supplements similar findings in which the Commission has proactively linked article 13 violations to a people's overarching right to self-determination, for example when election

54 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000). In considering this claim taken by an ousted head of state, the African Commission held that a military *coup d'état* constitutes a 'grave' violation of the right to self-determination under art 20(1), and that such conditions preclude availability of an effective remedy through the courts.

55 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009). While the African Commission found that the Southern Cameroonians have a valid claim to self-determination as a 'people' based upon their distinct identity, it found no violation of their right to self-determination because no violation of their right to political participation within the unitary state had been established.

56 *Gunme* (n 55 above) paras 169 & 174.

57 *Gunme* (n 55 above) para 171.

58 *Gunme* (n 55 above) para 178.

59 *Gunme* (n 55 above) para 181.

60 *Katangese Peoples' Congress v Zaire* (n 53 above) para 6. Art 13 reads '(1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives, in accordance with the provisions of the law ... (3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.'

results are ignored or annulled.[61] According to the Commission, this nexus applies not only to the whole people of a state, but also to minority peoples facing exclusion from article 13 rights. Provided the stringent additional *Katanga* test can be met, the exercise of self-determination by a distinct people within the context of a unitary state may be warranted. That is, there must be 'concrete evidence of violations of human rights to the point that the territorial integrity of the state party should be called to question ...'[62] While the African Commission finds that it cannot 'condone or encourage secession, as a form of self-determination',[63] it emphasises that 'secession is not the sole avenue open ... to exercise the right'.[64] It thus affirms its position set out in the *Katanga* case that 'independence, self-government, local government, federalism, confederalism, unitarism or any form of relations that accords with the wishes of the people' are acceptable and may also be 'fully cognisant of other recognised principles such as sovereignty and territorial integrity'.[65] Hence it would appear that article 20 claims generally cannot be adjudicated independently of article 13. A finding of violation of article 13 is therefore a probable second prerequisite, together with a prior finding that the group in question constitutes a 'people' within the meaning of the African Charter. Provided that these are in place, article 20(2) rights clearly can apply to both whole peoples of a state and minority peoples opposing violations of the right to self-determination.

There is another possibly important but strange finding in *Gunme* regarding the correct sequence of judicial determination: '[W]hen a complainant seeks to invoke article 20 ... it must [first] satisfy the Commission that the two conditions under article 20(2), namely, oppression and domination have been met.'[66] Yet article 20(2) is apparently neither raised by the claimant nor discussed at all prior to this paragraph, nor are the legal content nor tests for 'oppression' and 'domination' elsewhere defined by the Commission. Indeed, it may not even be that 'domination' is a separate test in article 20(2) in the way that 'foreign domination' clearly is for application of article 20(3). The Commission's logic and reasoning here are not clear. Particularly since it is technically possible to make an article 20(1) claim without making any further claim as to rights under articles 20(2) or 20(3), surely it must be the inverse. Rather, an affirmative article 20(1) finding

61 *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) paras 51-53.

62 *Gunme* (n 55 above) paras 194 & 199-200, citing *Katangese Peoples' Congress v Zaire* (n 53 above) para 6.

63 *Gunme* (n 55 above) para 190.

64 *Gunme* (n 55 above) para 191.

65 *Gunme* (n 55 above) para 188, citing *Katangese Peoples' Congress v Zaire* (n 53 above) para 4.

66 *Gunme* (n 55 above) para 197.

that the complainants are in fact a 'people' denied the right to self-determination as a consequence of the denial of article 13 rights must precede consideration of an article 20(2) claim, which would require the meeting of a separate test for 'oppression', in addition to a further test for whether the means employed or proposed to be employed are internationally lawful at the time of consideration. This should be formally clarified.

The African Commission's earlier finding in *Jawara* also sets a particularly relevant precedent, although it does not address article 20(2) directly even by way of reference. The complaint concerned a military *coup* and subsequent abuse of power by the military regime, including the abolition of the Bill of Rights by military decree and the banning of all democratic political activity. The Commission finds that seizure of power by military *coup*, even where no violence is involved, is a 'grave violation' of article 20(1).[67] Having found that in this context there is no effective remedy available through the courts,[68] the Commission restates the principle of 'available, effective and sufficient remedy' which requires that 'the petitioner can pursue it without impediment ... [it] offers a prospect of success, and ... is capable of redressing the complaint'.[69] Indeed, the Commission's established position is that 'a remedy that has no prospect of success does not constitute an effective remedy'.[70] A complainant should not be expected to pursue a remedy through the courts where a regime has little regard for the judiciary and where through severe repression a regime causes 'generalised fear'.[71] In a future case, either of these two findings – that undemocratic seizure of power constitutes a grave violation of the right to self-determination, or that conditions of repression may be sufficient to negate any prospect of effective remedy through the courts implying that any effective remedy at domestic level may only be had through non-judicial means – would surely provide grounds for a further finding of a valid right to resist oppression under article 20(2), even if the authorised means could only be determined by looking elsewhere in international law.

These three cases together represent a skeletal framework covering both majority and minority claims – with *Jawara* as the leading majority claim case and *Gunme* now providing the principal precedent minority claim case, affirming and extending the *Katanga* case. However, two major legal questions remain that need to be resolved to guide any future article 20(2) determinations: What is 'oppression' within the framework of the Charter and what are currently 'recognised means' within the international community according to the applicable law? Finally, in light of all of the above, what might be an appropriate test

67 *Jawara v The Gambia* (n 54 above) paras 72-73.

68 *Jawara v The Gambia* (n 54 above) paras 28-40.

69 *Jawara v The Gambia* (n 54 above) paras 31-32.

70 *Jawara v The Gambia* (n 54 above) para 38.

71 *Jawara v The Gambia* (n 54 above) paras 34-37 & 40.

to determine which classes of claimants actually engaging in various forms of resistance in Africa today are potentially protected in their actions by article 20(2)?

3.5 What is 'oppression' within the framework of the African Charter?

The principal issue now requiring clarification with respect to article 20(2) is exactly what legally constitutes 'oppression', because there will be no Charter right to resist human rights violations that does not meet this threshold. This is a matter upon which even Ouguergouz declines to speculate.[72] Since there is no right to resist 'oppression' specifically, there is also no precedent elsewhere in international human rights treaty law, or indeed apparently in international customary law, upon which to rely. Therefore it may well be that interpretive guidance from a basic but otherwise authoritative conceptual definition provides an appropriate starting point. This is in keeping with Viljoen's observation that in the absence of reliable detailed *travaux*, the African Commission has tended to rely on a 'textual' approach to construction in the first instance.[73] In this regard, note that since there is no appreciable difference in meaning between (at least the English and French) versions of the provision, textual variation is not a source of clarification.[74]

Neither the *Max Planck encyclopedia of public international law* nor the *Oxford concise dictionary of law* contains a definition of 'oppression'. However, the *Oxford dictionary of English* defines it as 'prolonged cruel or unjust treatment or exercise of authority',[75] and the *Oxford dictionary of law enforcement* defines it as 'the exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc; the imposition of unjust or unreasonable burdens, including practices such as 'torture, inhuman or degrading treatment and the use or threat of violence'.[76] The definition of 'oppression' from *Black's law dictionary* is 'the act or an instance of unjustly exercising authority or power'.[77] At an individual level and for the purpose of potential prosecution, it is 'an offence consisting in the abuse of discretionary authority by a public officer who has an improper motive, as a result of which a person is injured ...'[78] Likewise, in the Butterworths definition, taken from *Halsbury's laws*, 'a public officer commits the common law offence of oppression if while exercising his

72 Ouguergouz (n 26 above) 208 fn 694.

73 Viljoen (n 40 above) 325-326.

74 The French version reads: 'Les peuples colonisés ou opprimés ont le droit de se libérer de leur état de domination en recourant à tous moyens reconnus par le Communauté internationale.'

75 A Stevenson (ed) *Oxford dictionary of English* (2010).

76 M Kennedy (ed) *The Oxford dictionary of law enforcement* (2007).

77 BA Garner (ed) *Black's law dictionary* (1999) 1121.

78 Garner (n 77 above).

office, he inflicts upon any person from an improper motive any bodily harm, imprisonment or injury...'[79] In the latter two definitions, acts of extortion are excluded as they are considered 'more serious'.

It becomes clear from any of the above definitions that 'oppression' is a broad rather than narrow concept, related to misrule and misuse of authority and likely involving violations of one or more of the other substantive rights in the African Charter. Surely, to graduate the violation from its individual instance to the 'oppression' form, engaging not merely individual rights but the rights of a people as a whole for the purposes of article 20(2), such violations must be at least systematic and serious. It may or may not be necessary to reach the level of 'gross' violation, however, particularly since 'any authorised means' does not inherently equal 'forceful means'. Instead, the means authorised may be calibrated based in part on proportionality, drawing from other sources of law as per articles 60 and 61. 'Prolonged' conduct, as suggested by the standard dictionary definition above, is not actually a requirement contained in any of the three legal definitions. Indeed, the right would have little protective value in practice were this so. As article 20(2) determinations do not involve individual prosecution, provided the above elements are met, such oppressive conduct need not be that of a public official, but could also be that of another legal person exercising 'power or authority' in an abusive way that systematically deprives a people of any of its Charter rights.

Once 'oppression' has been established, then the dependent formula engages. This requires the identification of established permissions and limitations on means recognised elsewhere in international law.

3.6 What are 'recognised means' in the international community?

In theory, the first element of article 20(2) contains the prospect of a significant advance in human rights by providing the first and only express recognition of the right to resist 'oppression' in international law – an achievement the drafters of the Universal Declaration could not manage to agree upon. However, the second element, regarding 'recognised means', reduces the chances for making the right meaningful in practice. Accordingly, while this Charter right to resist is seemingly broad with respect to qualification for rights holders, there is much less room to make distinctive African choices regarding its exercise.

Precisely because the African Commission, African Court and others will have to work within whatever standards of international law pertain at the time, and in doing so rely on the interpretive sources authorised under articles 60 and 61, this currently also means dealing with significant legal gaps and ambiguities as to permissible means. Importantly, however, means protected as standard individual political

79 JB Saunders (ed) *Words and phrases legally defined* (1989) 281.

rights elsewhere in the African Charter and in universal international human rights law – the *lex generalis* or ordinary law – are not at issue here, because they are already otherwise catered for, and article 20(2) is not required to protect them. Rather, article 20(2) concerns the *lex specialis* or special law applying under the exceptional circumstances of oppression of a people.[80]

As set out above, customary law in the form of UN General Assembly Resolution 2625 is thought to provide the closest thing to a settled case on authorised means beyond those protected under ordinary law. That is, those peoples facing forcible deprivation of their right to self-determination in the form of colonialism, foreign invasion or occupation or rule by a racist regime have the right to resist using any means, including forceful means. However, these must be employed in a manner consistent with the frameworks established in the areas of international human rights law, international humanitarian law and international criminal law, in particular Additional Protocol I to the Geneva Conventions and the Rome Statute of the International Criminal Court, which do not recognise or confer the right to resist itself, but rather govern its exercise. As they focus mostly on prohibited forceful means, these instruments provide important legal clarity delimiting actions that cannot be authorised despite a right to resist and will not be recognised as lawful under any circumstances, even if the resort to forceful means as such is permitted elsewhere in law. These are actions amounting to grave breaches, war crimes, crimes against humanity and genocide.

Yet some analysts question whether this interpretation of exclusive application of the customary law to situations of forcible deprivation of 'external' self-determination should really be as rigid as others maintain. Ouguergouz and Cassese, for example, both suggest that there may also be some room for applicability of the UN General Assembly Resolution 2625 authorisation to forcible deprivation of 'internal' self-determination, either by a people as a whole or by a minority people.[81] If so, this would open up significant flexibility for the African Commission, African Court and others in considering this question with respect to article 20(2). The admitted impediment to this, however, is not the letter of the legal principles as stated in the resolution, but that it is unlikely that this broader application has yet reached the status of acceptance in customary law.[82]

As a consequence of the above, UN Security Council Resolutions 1970 and 1973 on Libya and any subsequent resolutions relating to similar situations may also have some implications for the interpretation

80 Ouguergouz (n 26 above) 208 fn 694.

81 See the discussion in Ouguergouz (n 26 above) 227-241; A Cassese *Self-determination of peoples: A legal reappraisal* (1995) 150-155 108-120 takes the more conservative approach, limiting the application to racial and religious groups constituting a minority 'people'.

82 Ouguergouz (n 26 above) 235 242-243.

of authorised means under article 20(2) insofar as they constitute an authoritative interpretation of the UN Charter and represent a significant development in the practice of the UN Security Council, and thereby contribute to the evolution of international law. While they do not contain any express provisions in this regard, they arguably constitute an instance of implicit recognition of the right to resist tyranny and oppression in their notable and unusual failure to equally condemn the use of force by the Libyan rebels, while at the same time authorising a spectrum of sanctions against the Libyan state for its use of force in suppressing the rebellion.[83] That said, the failure to reach consensus on Resolution 1973 authorising member state force against the regime for the purpose of civilian protection, and the subsequent failure by the Security Council to secure comparable resolutions with respect to similar contemporaneous situations of oppression in nearby states, shows that there probably has not yet been a definite change in the customary international law on a people's right to resist forcible deprivation of the right to internal self-determination, at least as regards the law on assistance. However, insofar as they may provide early evidence of a nascent modification in, or expansion of, customary international law now in the process of formation, such developments bear watching. Moreover, the Libyan case provides a prime example of why proceeding to provide UN or other UN-authorised regional assistance to a resistance movement without any clear adjudicatory framework as to the initial claim is fundamentally problematic. If anything, the Libyan example underscores the positive regulatory potential in the development of article 20(2) as an opportunity to establish coherent law not only for the AU, but which could also contribute constructively to the future clarification of universal norms in this regard. For now, the issue of the position of customary international law with respect to the employment of force to resist forcible deprivation of the right to internal self-determination is a legal question that demands examination and confirmation or potentially fresh assessment upon each instance of consideration by the African Commission, African Court or other adjudicators or analysts.

For otherwise illegal means short of armed force – those peaceful and other means that are at the illegal end of the spectrum of tactics and therefore not generally authorised due to ordinary limitations under the *lex generalis* – the gaps in the law resulting from the 'constructive ambiguity' in ICCPR and the Universal Declaration outlined above may provide the African Commission and African Court with some greater

83 The issue of the right to resist was never openly aired nor directly stated. However, the resolutions themselves contain implicit recognitions, as did the contributions of certain Security Council members during the debates; see UN Security Council UNSC Resolution 1970 26 February 2011, UN Doc S/Res/1970 (2011); UNSC Resolution 1973 17 March 2011, UN Doc S/Res/1973 (2011); UNSC Verbatim Record 26 February 2011, UN Doc S/PV 6491; UNSC Verbatim Record 17 March 2011, UN Doc S/PV/.6498.

latitude. The unexplored and underexamined issues in the universal system can provide openings for fresh African construction, particularly as to exceptionally authorised peaceful but otherwise illegal means. However, in doing so, those limitations already established by the rather conservative case law of the UN Human Rights Committee (Human Rights Committee) with respect to the related provisions governing expression and assembly will also need careful consideration.

It is well established that under ICCPR, in addition to the actions amounting to 'assembly' protected by article 21,[84] other symbolic and direct political actions may also attract the protection of article 19[85] as a form of political 'expression'.[86] However, to qualify they must not only be 'peaceful' in nature, but also must not pose a threat to public order as this could render lawful otherwise unlawful restrictions on the right, based on state necessity.[87] In fact, it is the Human Rights Committee's position that if the acts themselves are generally criminalised, even entirely non-violent protest may fall beyond the scope of protection, especially if the actions interfere directly with the rights of, or present a danger to others, regardless of the motivation behind the actions.[88] Apparently the Human Rights Committee is of the view that this basis for stripping protection otherwise afforded to 'peaceful' action can apply even if both the criminal acts and the consequent infringements of the competing rights involved are minor, as for example with sign defacement.[89] The approach to application of the article 21 protections on freedom of assembly, the *lex specialis* of freedom of expression through action,[90] is similar. Even assemblies that commence peacefully can 'lose

84 Art 21 ICCPR: 'The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.'

85 Art 19(2) ICCPR: 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds ... through any ... media of his choice.' Art 19(3) ICCPR: 'The exercise of [this right] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.'

86 Communication 412/1990, *Kivenmaa v Finland* UN HR Committee 10 June 1994, UN Doc C/50/D/412 paras 6.2 & 9.3.

87 Communication 628/1995, *Tae Hoon Park v Republic of Korea* UNHR Committee 3 November 1998, UN Doc C/64/D/628/1995 paras 2.4, 9.3 & 10.3.

88 Nowak (n 30 above) 439 445.

89 Communication 384/1989, *GB v France,* UNHR Committee 1 November 1991, UN Doc C/43/D/348/1989 para 5.2; Communication 347/1988, *SG v France,* UNHR Committee 1 November 1991, UN Doc C/43/D/347/1988.

90 Nowak (n 30 above) 477 485-487. See also JP Humphrey 'Political and related rights' in T Meron (ed) *Human rights in international law: Legal and policy issues* (1984) 188, cited and concurred with in the dissenting opinion of Kurt Herndl in *Kivenmaa v Finland* (n 86 above) dissenting opinion of Kurt Herndl paras 3.1-3.5.

their peaceful character' and thereby fall outside the scope of protection particularly as a consequence of reactive or otherwise unplanned use of force by demonstrators against people or property, even if minor and not involving arms.[91] All such non-peaceful assemblies may thus be lawfully 'prohibited, broken up or made subject to other sanctions' within the limits of ICCPR 'without [the state] having to observe the [ordinary] requirements for interference'.[92] Thus, the Human Rights Committee to date has not shown any tolerance of illegal non-peaceful means of resistance.

Illegal but peaceful physical occupations or blockades, on the other hand, may qualify for protection according to Nowak, although such actions and other peaceful assemblies may also be restricted in accordance with law, provided that state necessity for any of the legitimate purposes under article 21 can be shown.[93] This includes the 'rights of others' limitation, which under articles 19 and 21 extends beyond protection of fundamental ICCPR rights to other lesser rights, such as private property rights.[94] This consideration may partially explain the Human Rights Committee's conservative approach. However, in the specific context of oppression of a people, African adjudicators may elect not to accord these the same weight as the competing fundamental rights of peoples. This would be justified, as the Human Rights Committee is considering these rights in a treaty instrument without a clear law of exception in the form of an express right to resist equivalent to the African Charter. Its approach should therefore not be unduly restrictive on the interpretation of article 20(2) of the African Charter, so long as the reasoning is generally consistent with that of the Human Rights Committee.

Therefore, the basic requirement of general international human rights law appears to be that, under normal conditions at least, resistance actions must be peaceful. At such time as actions employ force of any kind but also under certain circumstances where they are peaceful but otherwise illegal, at present they probably fall outside the scope of protection of the general law. Particularly on peaceful but otherwise illegal means, however, the African Commission or Court could come to a different conclusion that still respects the overarching framework of the law, but only if it can be established that the balance of competing rights favours the fundamental rights of the claimants in a clear context of oppression where no other effective remedy exists, with the possible additional requirement that the actions taken in resistance are both necessary and proportionate to remedy the violations resisted by

91 Nowak (n 30 above) 487.

92 Nowak (n 30 above) 487-488.

93 As above.

94 Nowak (n 30 above) 494.

such means.[95] Quite possibly this is also true regarding illegal non-peaceful means short of armed force, in exceptional cases.

At present, the African Commission arguably has room for this departure because the Human Rights Committee still has not addressed what should be the most fundamental consideration in calibrating what means should be authorised and protected. That is, the Human Rights Committee's case law has not generally examined the context in which illegal protest actions take place. Its reasoning also usually does not include an examination of whether alternative equally or comparably effective modes of remedy are available – or in other words, the necessity of a particular and otherwise prohibited form of action. This surely is the crux for human rights defenders, but the article 19 and 21 jurisprudence is deficient in this regard. In one case, the poor quality of submissions effectively prevented the Human Rights Committee from properly examining this issue,[96] but on other occasions it has avoided doing so.[97] Indeed, in an instance where a participant in a detention centre hunger strike claimed this action as a 'legitimate expression of the right to protest' and the state counterclaimed that such actions are not protected by article 19, the Human Rights Committee flatly refused to address itself to this issue or to consider whether in the context alternative effective means were available.[98] Since the Human Rights Committee has not considered whether context has a bearing on the construction of these rights, it remains to be determined whether such a narrow approach is reasonable and appropriate to be applied under conditions of oppression. This is where there may be space for the African Commission and the African Court, in particular, to engage in some important independent reasoning that still takes proper account of the positions outlined above. If it falls to examine this issue, General Comment 10 on article 19, in which the Human Rights Committee accepted that restrictions on the exercise of freedom of expression through actions 'may not put in jeopardy the right itself',[99] should provide the ultimate guiding principle that is also consistent with the general approach already taken by the African Commission in other areas.

As for other sources of law and legal interpretation, the African Commission and African Court will also want to take into account

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95 On necessity and proportionality in relation to the right to resist, see Eide (n 12 above) 54-56 60-63; Tomuschat (n 12 above) 19 27 30; Paust (n 14 above) 569; Kaufmann (n 14 above) 574; Schwartz (n 13 above) 265-269 273-276 278-284.

96 Communication 386/1989 *Koné v Senegal*, UNHR Committee 27 October 1994, UN Doc C/52/D/386/1989 paras 2.1, 2.3, 3, 6.8, 7.4, 7.7 & 8.5.

97 Communication 518/1992, *Sohn v Republic of Korea*, UNHR Committee 3 August 1995, UN Doc C/54/D/518/1992 paras 7.1-7.2, 8.1, 9.1, 9.3 & 10.2.

98 Communication 1014/2001, *Baban v Australia*, UNHR Committee 18 September 2003, UN Doc C/78/D/1014/2001 paras 3.4, 4.5 & 6.7.

99 General Comment 10 Freedom of Expression (art 19) UNHR Committee, UN Doc A/29/06/83 (1983) para 4.

the potential implications of relevant developments happening at the UN level. Arguably, the consensus on UN Security Council Resolution 1970, with its seemingly implicit authorisation of a self-help right to use force to resist tyranny and other forms of oppression as well as massive human rights violations amounting to crimes against humanity, opens up previously unavailable legal space for justifiable reconsideration of an evolutive construction of the net effect of articles 1, 2(3)(a) and 25 of ICCPR as authorising a right to resist, as well as the interpretive guidance to be provided by paragraph 3 of the Preamble of the Universal Declaration, as per the theories advanced by Rosas and others outlined above. The aforementioned view of the UN Human Rights Council Advisory Committee and the ultimate position of the Council itself on the right to resist various forms of human rights violations may also need to be considered by commissioners and judges in their analysis.

3.7 Who are the protected and possibly protected groups?

As a consequence of the above, it is possible to establish general categories of 'peoples' facing a variety of situations of 'oppression' deriving from other human rights violations within the meaning of the African Charter that could activate a secondary right under article 20(2). Where such a right would engage, further analysis is required, not only as to what means would be authorised under the Charter, but also the consequent implications. For example, in some instances article 20(2) could provide a defence against prosecution, or even invalidate certain laws either generally or in their specific application. In other instances, a positive article 20(2) finding would give rise to a state duty under article 20(3), thereby validating and mandating compliance with requests for assistance and in certain instances possibly obliging the AU or individual state parties to request the additional assistance of third parties thus authorised under international law, such as the UN Security Council.

Logically it should be both possible and foreseeable that a claim under article 20(1) could be considered separately and need not necessarily be tied to a prior assessment of the additional article 20(2) criteria, if a right to resist under article 20(2) is for whatever reason not raised as an issue by the claimant. Importantly, just as not all claimants who qualify for self-determination rights under article 20(1) will also qualify for the further right to resist under article 20(2), not all claimants who qualify under article 20(2) will also qualify for the further right to assistance from other African states under article 20(3) because it is restricted to those resisting 'foreign domination'. Therefore, most of those resisting oppression by a domestic power probably do not share this additional sub-right. A prior positive finding on article 20(1) and article 20(2) claims would be necessary but not sufficient to validate any separate or concurrent claim for assistance made under article 20(3), which would need to be subject to a separate assessment last in the sequence, to ensure among

other things that the 'foreign political, economic or cultural domination' criterion is also met.

Drawing on the constructions the African Commission has thus far established in the *Katanga*, *Jawara* and *Gunme* cases, and taking account of the additional aspects outlined above, the basic form of a two-part article 20(2) test emerges. Part one of the test concerns the first element, and would establish whether a complainant has sufficient grounds for the claim to a right to resist based on oppression. Part two of the test concerns the second element, and would assess the scope of means of resistance authorised under international law in the individual case at hand.

The primary 'element one' test has four prongs. First, does the claim to a right to resist involve a 'people' under article 20(1) as defined by the African Commission in the *Gunme* case? If this cannot be established, then the claim falls. Second, is such a people denied its right to political or economic self-determination and democratic means of political or economic change, particularly by way of exclusion from democratic political participation and representation rights under article 13(1), as set out in the *Katanga* case? Note that the appropriate form for ultimately exercising those self-determination rights may not be relevant to determine at the stage of adjudicating whether the claim to a right could be valid. Third, can conditions constituting 'oppression' be established: Is there a pattern of abuse of power or authority involving primary rights violations against the people that are at least serious, if not grave or massive, as well as systematic? Or is the form of rule complained of inherently oppressive insofar as it is unconstitutional, corrupt, or otherwise the consequence of an undemocratic seizure of power with or without violence? Fourth, do such people also have no prospect of any other 'available, effective and sufficient' remedy, for reasons that may include repression or undemocratic seizure of power or unconstitutional rule, or control or corruption of the judicial system, as established in the *Jawara* case? In other words, the sequence after the first hurdle is in the form of a three-step necessity test.

If the answer to all of the above is affirmative, this could justify a finding that the claimants in question have a right to resist under article 20(2), provided that the objectives of the resistance are compatible with the African Charter's broader human rights framework and thereby do not fall afoul of the article 27(2) requirement of due regard for the rights of others. In addition to the obvious cases of post-colonial foreign invasion and occupation, such situations could certainly include either whole peoples of a state or minority peoples facing massive violations amounting to crimes against humanity or genocide, as well as situations of *coups d'état* or other forms of unconstitutional rule. The right could also apply to minority peoples facing situations of systematic discrimination and exclusion warranting secession or lesser forms of self-governance, provided that the conditions complained of are convincingly established, bearing in mind the African Commission's

understandable reluctance to make positive determinations in any cases based on thin evidence and its preference for internal self-determination solutions. The right could also engage for those resisting situations of foreign economic domination amounting to an interference with the right to self-determination, provided that such conditions could be established in a way that satisfies the African Commission or African Court. It also cannot be discounted that certain situations of systematic violations of economic and social rights of either a whole people of a state or of a minority people could give rise to a valid claim to a right to resist if all the other conditions are also met and if the level of abuse of power involved amounts to economic 'oppression'.

If there is significant potential in the proposed primary test for article 20(2) to vindicate the rights of the most vulnerable and their human rights defenders, at least in theory, the necessary secondary 'element two' test that will give such a right meaning in practice is bound to disappoint many claimants and frustrate adjudicators due to the restrictions inherent in the dependent formula. As outlined above, complete interpretation of this provision requires clarification elsewhere in international law. As it stands, the right of peoples to use force in resistance is largely confined in contemporary cases to those resisting foreign invasion and occupation involving the use of state force, although it may in some instances also extend to those resisting 'racist regimes' whose rule is established or maintained through the use of force if the stringent tests for this can be met. Such instances should be relatively few. There is at least theoretical scope within the letter of UN General Assembly Resolution 2625 to extend the right to use force in resistance to undemocratic domestic regimes that rule by force. However, as has recently been demonstrated by UN Security Council Resolution 1973 and the selective application of this principle in practice, it has not yet crystallised into customary law – despite its powerful largely Western proponents. Unfortunately, for as long as it persists, this situation would surely fetter the ability of the African Commission or Court to make more generous determinations in this regard that might otherwise be advantageous to the human rights defenders and populations at stake in resolving the human rights violations they face. At present, therefore, all other claimants will in the secondary test probably be restricted to peaceful means of resistance, though it may be possible to apply further necessity as well as proportionality tests to specific actions in specific situations in a more progressive manner than the UN Human Rights Committee has in its limited jurisprudence on freedom of expression and assembly under the universal system. The African Commission or African Court certainly has sufficient room to lead the way in re-interpreting the scope of permissible peaceful means where a right to resist is proven, for example to include exceptions for otherwise illegal acts related to non-violent civil disobedience. If so, even if it cannot go further at present, this would be an important contribution to progress in international human rights law, would respect the legacy

of past African human rights defenders, and go some distance to meet the needs of those currently at the frontlines.

4 Conclusion

As set out above, in article 20(2) the African Charter contains the framework for an advancement in human rights of significance domestically, regionally and internationally. At the regional level, if developed responsibly, article 20(2) has as yet untapped potential to ensure an effective remedy to Africa's most vulnerable, using an empowerment model to both complement and help regulate the emerging doctrine and practice of 'responsibility to protect', and to reinforce the evolving AU emphasis on democratisation through a human security-oriented model of deterrence to those who would abuse power or rule by force. This would also have significance at the international level. In the context of the current debate at the UN Human Rights Council, a reasoned interpretation and application of article 20(2) could assist the momentum by demonstrating how the existing African right to resist may link with a strong commitment to the African right to peace. Moreover, coherent African Charter jurisprudence could assist domestic African courts seeking to interpret and apply their own constitutional provisions on the right to resist in a manner that complies with the requirements of the African human rights system. In those countries without a constitutional right to resist, article 20(2) determinations could help establish the lawfulness of laws intended to restrict certain forms of political dissent activity, where such actions would not be otherwise protected by the freedom of expression, association and assembly provisions of the ordinary law. For example, specific proceedings in relation to sedition or treason or even the laws themselves depending on their framing could be shown to be fundamentally incompatible,[100] or else require interpretation or amendment to provide a defence if it can be shown that the accused was acting within internationally lawful means, as part of a people resisting oppression or other domination within the meaning of the African Charter. Indeed, the African Commission and Court are mandated to provide guidance to member states in this regard.[101]

Realising these opportunities requires an end to avoidance of the issue of article 20(2) rights at both international and African levels and

100 It is unfortunate that the complainant's submissions under art 20(1) in *Courson v Equitorial Guinea*, challenging a prosecution for high treason allegedly on the basis of political opinion manifest in participation in an election boycott, relying in part on art 20(1), failed to adduce evidence sufficient to enable the African Commission to consider this question and the claim was therefore dismissed. *Courson v Equitorial Guinea* (2000) AHRLR 93 (ACHPR 1997) paras 17-19.

101 Art 45 African Charter; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples Rights 9 June 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) arts 3-5.

inter-institutionally within the AU. The case of the Libyan uprising of 2011 is a prime example of this. Despite Libya's Charter obligations as a state party and the consequent rights of the Libyan people under article 20(2) to resist when the relevant conditions are met, of the main UN and AU bodies who have dealt with the situation to date – the UN Security Council, the UN Human Rights Council, the AU Peace and Security Council, the African Commission and the African Court – none have yet openly examined, much less directly concluded on this obviously relevant question, at least in their public statements and findings.[102]

The challenges posed by this right and this provision should not be minimised, but its requirements also cannot be ignored. According to article 3(h) of the Constitutive Act of the African Union, all relevant AU instruments must be interpreted in a manner that respects the fundamental Charter rights and therefore must take account of the article 20(2) exception.[103] That is, subsequent law and indeed other apparently or potentially conflicting provisions must be construed in light of article 20(2), not the reverse. This remains the case unless and until an express amendment voids or makes an exception to article 20(2). Therefore, clarification of the article 20(2) right is essential, not optional. Among those requiring coherent interpretation are article 4(p) of the Constitutive Act of the AU, the OAU Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, and the African Charter on Democracy, Elections and Governance, once this instrument has entered into force.[104] While these

102 See eg AU Peace and Security Council Communiqué 23 February 2011, AU Doc PSC/PR/COMM (CCXLI); African Commission on Human and Peoples' Rights 'Resolution on the human rights situation in the Great Socialist Republic of the Libyan Arab Jamahiriya' 1 March 2011, AU Doc ACHPR/Res/181 (EXT.OS/IX) (2011); Libya AU Peace and Security Council Communiqué 10 March 2011, AU Doc PSC/PR/COMM.2 (CCXLV) ('AU roadmap for resolution to the Libyan crisis'); *African Commission on Human and Peoples' Rights v Great Socialist Peoples' Libyan Arab Jamahiriya* (App 004/2011) Order for Provisional Measures (ACtHPR 25 March 2011); AU Peace and Security Council Communiqué (26 April 2011) AU Doc PSC/MIN/COMM.2 (CCLXXV) and AU Peace and Security Council 'Report of the chairperson of the commission on the activities of the AU high level *ad hoc* committee on the situation in Libya' (26 April 2011) AU Doc PSC/PR/2 (CCLXXV); UN Human Rights Council 'Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya' (1 June 2011) UN Doc A/HRC/17/44.

103 Art 3(h) Constitutive Act of the African Union, entered into force 26 May 2001, OAU Doc CAB/LEG/23.15: 'The objectives of the Union shall be to ... promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments ...'

104 Art 4(p) Constitutive Act of the African Union: 'The Union shall function in accordance with the following principles [including] ... condemnation and rejection of unconstitutional changes of government.' OAU Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (2000) OAU Doc AHG/Decl.5 (XXXVI); and African Union, art 3.1 African Charter on Democracy, Elections and Governance 30 January 2007, http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf (accessed 15 June 2011).

appear to take no account of the exceptional article 20(2) right and consequent obligation, that is not to say they could not be interpreted compatibly in practice.

In addition, it is obviously crucial to guard against the politicisation or selective application of article 20(2), in particular by the AU political organs, including the Peace and Security Council, which would serve to undermine this right. Greater constructive engagement with its regulatory potential by legal academics and advocates will provide the best prevention in this regard.

For all of these reasons, African human rights defenders deserve further development of the African Charter right to resist: as a mode of implementation and enforcement of the body of human rights, as an effective remedy against violations, as a deterrent to violator regimes within human security frameworks, and as a complement or alternative to the 'responsibility to protect'. Notwithstanding that the African human rights system at the 30 year mark is not yet functioning optimally as a consequence of under-resourcing and under-use, among other issues, this series of further opportunities in the current context now present an imperative to consolidate and build on the distinctly African contribution to the development of international human rights law and the scope of its protections through considered jurisprudential leadership on the right to resist in article 20(2).

AFRICAN HUMAN RIGHTS LAW JOURNAL

The African Court on Human and Peoples' Rights' order in respect of the situation in Libya: A watershed in the regional protection of human rights?

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Summary

The article considers the significant features of the order rendered by the African Court on Human and Peoples' Rights in respect of the situation in Libya after protests that began on 16 February 2011. During the first weeks of the unrest, the government of Libya responded to protests across the country in a highhanded and violent manner, further worsening the situation which escalated even further to a more serious level of human rights violations. The applicants – human rights organisations – petitioned the African Commission on Human and Peoples' Rights in respect of the deteriorating circumstances that were unfolding across Libya. The African Commission did not grant provisional measures; instead it referred the matter to the African Court. The Court swiftly responded to the African Commission's petition by granting an order for provisional measures. This note looks at features of the Court's order and reflects on its significance. Beyond this matter, the article looks at the relationship between the Court and the Commission and highlights lessons from the Inter-American regional system from which stakeholders within the African system could draw. It also looks at what the emergence of the African Court means to various stakeholders in the region.

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1 Introduction

On 25 March 2011, the African Court on Human and Peoples' Rights (African Court) granted an order for provisional measures in respect of the situation in Libya. The order was in response to an application filed before the Court by the African Commission on Human and Peoples' Rights (African Commission). The Commission petitioned the Court[1] after having received complaints from five non-governmental organisations (NGOs)[2] regarding the human rights situation in Libya.

In its order, the African Court requested Libya to refrain from action that would result in loss of life or violation of physical integrity and to report within 15 days on measures taken to implement the order. The African Commission's move to refer the matter to the Court is a bold statement to states that have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) and the African Charter on Human and Peoples' Rights (African Charter) that it would react to massive human rights violations in the region. The African Court took an innovative step and speedily granted provisional measures even though the African Commission had not requested these.

The article looks at the significant features of the Court's order and its contribution to the protection of human rights in Africa. It considers the relationship between the Court and the Commission and highlights lessons from the Inter-American regional system that stakeholders within the African system could draw from.

Beyond this case, this note looks at what the emergence of the African Court means for various stakeholders in the region. It concludes by arguing that the Court's order and its advent on the scene is a turning point in the protection of human rights in the region.

2 Application and the African Court's order for provisional measures

This matter arose from two applications filed before the African Commission by five NGOs in respect of gross human rights violations taking place in Libya in the wake of protests that had spread across

1 The African Commission submitted the application pursuant to art 5(1)(a) of the African Court Protocol which lists the Commission as one of the parties entitled to submit cases to the Court. It also submitted the petition in accordance with rule 118(3), which provides that the Commission may submit a matter to the Court in a situation that in its view constitutes serious and massive human rights violations as provided for under art 58 of the African Charter.

2 The Egyptian Initiative for Personal Rights, Interights and Human Rights Watch jointly filed a complaint to the African Commission. The International Federation of Human Rights and the Libyan League for Human Rights filed the second complaint.

the country.[3] At that point, the situation could not be considered an internal armed conflict. The initial application to the Commission was a request for provisional measures filed jointly by the Egyptian Initiative for Personal Rights, Interights and Human Rights Watch. The applicants requested the Commission to:[4]

(i) stop and prevent the use of unjustified lethal force against protesters, whether by the security forces, mercenaries or other bodies or individuals acting on behalf of the state;
(ii) allow people within Libya to air their grievances through peaceful protests;
(iii) allow the free flow of information, including by permitting international journalists to enter and report freely;
(iv) open up all forms of communication by restoring full use of the internet, television stations, mobile phones and social networks;
(v) respect the rights of detainees;
(vi) ensure that those injured during the protests are permitted access to appropriate medical treatment; and
(vii) undertake a thorough, impartial and prompt investigation to hold accountable those responsible for these violations.

The second application was jointly filed by the International Federation of Human Rights and the Libyan League for Human Rights. The two organisations requested that the application[5]

> be treated with the utmost urgency by the African Commission on Human and Peoples' Rights and that the Commission should refer this application to the African Court on Human and Peoples' Rights considering that the situation brought to its knowledge amounts to serious and massive violation of human rights and that Libya is a state party to the Protocol to the African Charter regarding the African Court on Human and Peoples' Rights.

3 International human rights organisations have reported extensively on the situation in Libya, See Human Rights Watch 'Security forces fire on day of anger demonstrations' 17 February 2011 http://www.hrw.org/en/news/2011/02/17/libya-security-forces-fire-day-anger-demonstrations (accessed 30 September 2011); Amnesty International ''Campaign of forced disappearances must end' 29 March 2011 http://www.amnesty.org/en/news-and-updates/report/libya-campaign-enforced-disappearances-must-end-2011-03-29 (accessed 30 September 2011). See International Federation of Human Rights (FIDH) Alkarama 'At least 250 people disappeared, 70 dead in Al Jabl Al Akhdar region' http://en.alkarama.org/index.php?option=com_ content&view=article&id=677:libya-at-least-250-people-disappeared-70-dead-in-al-jabl-al-akhdar-region&catid=27:communiqu&Itemid=138. See Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, Human Rights Council, 1 June 2011 A/HRC/17/44 http://www2.ohchr.org/ english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf (accessed 30 September 2011).

4 The application for provisional measures is on file with the author.

5 This application is on file with the author.

The African Commission did not grant provisional measures because 'the chances of such request eliciting a response from the government are very slim taking into consideration the situation in Libya'.[6]

The African Commission seems to have considered the precarious situation in Libya and then it based its decision on whether its intervention would obtain a response from the government. This is an unfortunate approach to interim measures and, more generally, the Commission's communications procedure. It is a regression which takes the Commission steps back in its protection of human rights on the continent. While it can be stated that the Commission's response was understandable given the political situation in Libya, the lack of binding powers and states' attitudes towards the Commission, the Commission's intervention in the form of a decision granting provisional measures in the matter would have sent a strong signal to the Libyan authorities that their actions fell short of their obligations under the African Charter.

Based on the violations in the complaints it had received from civil society organisations, the African Commission shortly after receipt of the applications filed a petition before the African Court.[7] That application alleged serious and massive violations of human rights. The Commission acknowledged that it had received various communications against Libya during its 9th extraordinary session held in Banjul from 23 February to 3 March 2011. In its application, it noted the following:[8]

- Subsequent to the detention of an opposition lawyer, peaceful demonstrations took place on 16 February 2011 in the Eastern Libyan city of Benghazi.
- On 19 February, 2011, there were other demonstrations in Benghazi, Al Baida, Ajdabiya, Zawiya and Derna, which were violently suppressed by the security forces who opened fire at random on the demonstrators, killing and injuring many people.
- Hospital sources reported that on 20 February 2011, they received individuals who had died or had been injured with bullet wounds to the chest, neck and head.
- Security forces had engaged in excessive use of heavy weapons and machine guns against members of the population, including targeted aerial bombardment and all types of attacks.
- The above-mentioned amounts to serious violations of the right to life and to the integrity of persons, freedom of expression, demonstration and assembly, whereas the Commission concluded that

6 The letter from the Secretariat of the African Commission, on file with the author.

7 ACHPR/CHAIR/AfCHPR/108.11.

8 In the matter of *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* Application 004/2011, Order for Provisional Measures, paras 2 & 3 http://www.african-court.org/fileadmin/documents/Court/Cases/Order_for_Provisinal_Measures_ against_Libya.PDF (accessed 12 June 2011).

> these actions amounted to serious and widespread violations of the rights enshrined in articles 1, 2, 4, 5, 9, 11, 12, 13 and 23 of the Charter.

In adopting the order, the African Court held that, in view of the ongoing conflict in Libya that makes it difficult to serve the application timeously on the respondent and to arrange a hearing accordingly, the Court decided to make an order for provisional measures without written or oral hearings,[9] because[10]

> there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subject of the application, in particular, in relation to the rights to life and to physical integrity of persons as guaranteed in the Charter.

The African Court specifically ordered the following:[11]

> The Great Socialist Libyan Arab Jamahiriya must immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party.
>
> The Great Socialist Libyan Arab Jamahiriya must report to the Court within a period of fifteen days from the date of receipt of the order, on measures taken to implement this order.

The African Court granted an order for provisional measures[12] nine days after its registry had received the application, even though the African Commission did not request that remedy. The Court's issuance of a remedy that the Commission did not ask for but which it deemed appropriate has been lauded by the applicants and is seen as a positive step. However, it would be problematic if the Court were to give a remedy not requested for or if it gave one with undesirable consequences on a given situation. Such a move would have dire consequences as it would negatively impact on the gains achieved in respect of the protection of specific rights that were the subject of the application. This was not a concern in this matter because the order granted by the Court responded to the situation on the ground in Libya. The swiftness with which the Court reacted is encouraging and a positive sign considering the lengthy delays that are characteristic of the Commission's litigation procedure.[13]

Although provisional measures are partly aimed at upholding the integrity of the body that will take the final decision, they also aim to secure the rights of the individual concerned pending finalisation of the communication. Compliance with provisional measures therefore

9 n 8 above, para 13 of the Court Order.

10 n 8 above, para 22 of the Court Order.

11 n 8 above, para 25 of the Court Order.

12 Court Order (n 8 above).

13 The applicant's experience litigating before the African Commission.

shows respect both for the body issuing those measures and for human rights – often the right to life.[14]

The International Court of Justice (ICJ) in the *La Grand* holding indicated that provisional measures under article 41 of the ICJ Statute were after all binding, and that non-compliance with them could give rise to state responsibility.[15]

Within the African system, provisional measures are provided for under the African Commission's Rules of Procedure.[16] While states have at times responded to the Commission's request for provisional measures, they have in certain instances ignored these appeals. In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, even though the Commission had invoked provisional measures, the Nigerian authorities went ahead to execute Ken Saro-Wiwa and his eight co-defendants.[17] In this case, the Commission held that non-compliance by a state party with provisional measures indicated by the Commission constituted a violation of article 1.[18] However, in its consideration of *Interights and Others (on behalf of Bosch) v Botswana*,[19] the African Commission did not find that a failure to abide by provisional measures when the applicant was executed, amounted to a violation of article 1. It is also worth noting that the Commission in the past had not responded to urgent requests for provisional measures.[20] This is a worrying trend as the Commission is the first port of call for civil society organisations in times of crises.

3 Procedure in this matter

Upon receipt of the petition from the African Commission, the African Court had regard to article 27(2) of the African Court Protocol and rule 51 of the Rules of Court. Article 27(2) of the Court Protocol provides that 'in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary'. Rule 51 of the Court's rules states that the Court may, at the request of a party, the Commission or of its own accord, prescribe to the parties any interim measure which it deems necessary to adopt in the interest of the parties or of justice.

14 F Viljoen *International human rights law in Africa* (2007) 326.

15 *La Grand* case (*Germany v USA*), ICJ Reports 2001 466 http://www.icj-cij.org/docket/files/104/7736.pdf (accessed 30 September 2011).

16 Rule 98 African Commission's 2010 Rules of Procedure.

17 (2000) AHRLR 212 (ACHPR 1998) para 10.

18 As above.

19 (2003) AHRLR 55 (ACHPR 2003) para 49.

20 *Law Offices of Ghazi Suleiman v Sudan* Communication 228/98 and more recently in *Redress Trust, SDFG, HRW & Interights v Sudan* in respect of the situation in South Kordofan (not yet decided).

Under rule 35(2)(a), the Court forwarded copies of the application to the respondent state and, as provided for in rule 37, invited it to respond to the application within 60 days. The registry forwarded copies of the application to the complainants in accordance with rule 35(2)(e).

4 African Court's consideration of its jurisdiction in this application

Before granting the order, the African Court satisfied itself that it had jurisdiction to deal with the application.

The Court then proceeded to consider article 3 of the African Court Protocol which provides that the jurisdiction of the Court extends to all cases and disputes submitted to it concerning the interpretation and application of the African Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned. Libya has ratified both the African Charter[21] and the African Court Protocol.[22] It also considered article 5(1)(a) of the Court Protocol which lists the African Commission as one of the entities entitled to submit cases to the African Court.

Before it considers the merits of the application, the Court may conduct a preliminary examination of its jurisdiction and the admissibility of the application in accordance with articles 50 and 56 of the African Charter and rule 40 of the Court's rules on conditions of admissibility.[23]

4.1 African Court's contentious jurisdiction

The African Commission and the African Court are both at the heart of the African regional human rights system, and have to work together if each mechanism is to carry out its role and achieve its goal. In the instance of this application, the Commission received the application as an impartial arbitrator. However, its role changed when it approached the African Court as a litigant advocating for the applicants. In this matter it wore both the hat of an adjudicator when it received the initial complaint and that of an applicant when it went to the Court. It will be interesting to see how the Commission's relationship with the NGOs that filed the initial complaint before it, presumably one of partnership, unfolds. Over the last few years, as the Commission has taken its role as the key human rights monitoring body on the continent in its stride,

21 Libya ratified the African Charter on 19 July 1986 and it came into force on 21 October 1986.

22 Libya ratified the African Court Protocol on 19 November 2003 and it came into force on 25 January 2004.

23 Rule 39 African Court's Rules.

it has increasingly taken on more work. For it to carry out its new role before the African Court effectively it will require time and resources. These are issues that the Commission needs to think through and work out while the numbers of cases for it to take to the Court are still small.

5 Relationship between the African Commission and the African Court

This case was the first in which the relationship between the African Court and the African Commission was tested. The Court 'shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the Commission'.[24] Apart from one of the entities entitled to submit cases to the Court,[25] the Court Protocol further provides that the Court may, when deciding on the admissibility of a case instituted under article 5(3) of this Protocol, request the opinion of the Commission which shall give it as soon as possible and the Court may consider cases or transfer them to the Commission.[26] The rules of both the Court and the Commission do not state how this will be done, so it appears it will be on a case-by-case basis. While this might seem as if it allows some flexibility, this back and forth consideration of the admissibility of a case between the two bodies could prolong the process. It also indicates a measure of uncertainty around the Court's admissibility procedure as, at the moment, applicants are not aware under what circumstances the Court would send cases to the Commission. In recent cases where the Court held that it had no jurisdiction to consider the petition as the respondent states had not made a declaration under article 34(6), it transferred the matter to the African Commission as provided for in article 6(3) in the African Court Protocol.[27] The Court has transferred a matter to the African Commission because an organisation did not have observer status with the Commission as required by article 5(3) of the Court Protocol.[28]

6 Lessons from the Inter-American system

Similarities in the set-up of the Inter-American system and the African regional human rights system present good practice that stakeholders

24 Art 2 African Court Protocol.

25 Art 5(1) African Court Protocol.

26 Arts 6(1) & (3) African Court Protocol.

27 *S Ababou v Algeria* Case 002/2011; *D Amare & Another v Mozambique & Mozambique Airlines* Case 005/2011.

28 *Association jurists d'Afrique pour la bonne gouvernance v Côte d'Ivoire* Case 006/2011.

from the latter can draw from. In this regard, the experience of the relationship between the Inter-American system with its Court and Commission is instructive. In that system, the co-existence of the two bodies, performing complementary functions, in stages of increasing intensity, encourages states to fulfil their obligations to co-operate in the resolution of a case.[29]

For example, the Inter-American Commission's quasi-judicial proceedings offer states an opportunity to settle the matter before it is brought to the Court while at the same time offering the petitioner the opportunity to obtain an appropriate remedy more quickly and simply than with a long litigation before a tribunal.[30] Before the Inter-American system, the effectiveness of the proceedings before the Commission particularly depends upon the circumstances of each case, the nature of the rights affected, the characteristics of the violations, and the willingness of the government to co-operate and take all necessary steps to bring about the reparation of the violations.[31] In the event a quasi-judicial approach does not work, the next step in this incremental mechanism is to refer the case to the Court.[32] A judge in the Inter-American system has stated that both the Court and the Commission need to regard each other as being partners in the same system, embarked in a joint venture.[33]

Because of its new role, the African Commission's working procedures will inevitably undergo modifications. The Commission needs to adapt to and gracefully accept these changes to ensure that any outcomes strengthen and not inhibit its role before the African Court and its relationship with civil society. The Inter-American Commission needed to reorganise its daily work in order to create the substantial records detailing all the relevant facts and legal arguments. As a result, the Inter-American Commission was forced to make many changes in its daily work. In addition, the experience of the Inter-American system shows that the African Commission and the African Court must use their staff and material resources effectively in the production of evidence and fact finding.[34]

The African Court's credibility in particular is built in part by a solid record that leaves no useful fact out, and the co-operation of the African Commission, the complainants and the state is crucial. To that end, the

29 AE Dulitzky 'The relationship between the African Commission and the African Court: Lessons from the Inter-American system' in 'A Human Rights Court for Africa' (2004) 15 *Interights Bulletin* 10.

30 As above.

31 Inter-American Court of Human Rights, *Velasquez Rodriquez* case, preliminary objections, judgment of 26 June 1989, para 60.

32 Dulitzky (n 29 above) 10.

33 C Medina 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a joint venture' (1990) 4 *Human Rights Quarterly* 439.

34 Dulitzky (n 29 above) 10.

Court has placed a strong burden on the state to produce evidence.[35] Justices are empowered to request and look for documents and records, and to interview witnesses. This dynamic and aggressive search for the truth has benefited the credibility of the Court and made it more effective.[36] While the African Court should not ape the Inter-American Court's mode of operation, there are lessons than can be drawn from the similar set-up of the Inter- American system.

Within the African system, the African Court and the African Commission need each other if they are to achieve the goal of effective human rights protection in the region. Regular meetings and open communication channels between the two bodies on litigation-related issues are key. The Court's rules provide that the Court shall meet with the Commission at least once a year and whenever necessary to ensure a good working relationship between the two institutions[37] and that the Bureau for the Court may meet the Bureau of the Commission as often as necessary.[38] The Court shall also consult with the Commission on any amendment of its rules, and any issues of procedure governing the relationship between the two institutions.[39]

While judges from the African Court have met with commissioners to harmonise their rules of procedures, among other things, it would be interesting to see how the collaboration unfolds in respect of litigation between the institutions, especially as the Court increasingly receives more petitions. The role of the applicants in the process as the Court considers their application and their functional relationship with the African Commission will need to be clarified as the Court receives more cases.

7 Implementation of the African Court's orders and judgments

The African Court's rules of procedure make specific provision for both the implementation of interim measures and the Court's judgment. This is a major shift as there is no implementation procedure in respect of provisional measures and decisions rendered by the Commission.

35 Eg, Inter-American Court of Human Rights, *Gangaram Panday* case, judgment of 21 January 1994, para 49, stating that in proceedings to determine human rights violations, the state cannot rely on the defence that the complainant has failed to present evidence when it cannot be obtained without the state's co-operation.

36 Dulitzky (n 29 above) 12.

37 Rule 29(1)(a) African Court's Rules.

38 Rule 29(1)(b) African Court's Rules.

39 Rule 29(2) African Court's Rules.

7.1 Interim measures

In this case, what happened after the African Court granted its order for provisional measures? The Libyan authorities made written submissions to the Court. The situation in the country has changed as there is now a new government recognised by the African Union (AU). The Court's rules provide that the Court shall notify the African Commission, the Assembly, the Executive Council and the African Union Commission of the interim measures it has prescribed.[40] In the event of non-compliance with these measures by the state, the Court shall make all such recommendations as it deems appropriate.[41]

7.2 Implementation of the African Court's judgments

Beyond this case, the African Court's judgments follow a specific implementation path. The African Court Protocol provides that states shall undertake to comply with its judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.[42] Once the Court renders a decision, the Council of Ministers must be notified of the judgment and will monitor its execution on behalf of the Assembly.[43] The inclusion of this provision in the Protocol means that compliance with the Court's decisions will not depend largely on a state's goodwill as is the case before the African Commission. All parties to the African Court Protocol are obliged to execute its decisions.

According to Kioko, the reason the follow-up activities in relation to the execution of the Court's judgments was left to the Executive Council and not with the Assembly was that it was felt that the latter did not have sufficient time to carry them out, and its working measures were not structured in a manner that would enable it to deal with the nitty-gritty issues relating to the execution of individual cases.[44] It is also significant that the Court's report to the Assembly must specify, in particular, the cases in which a state has not complied with the Court's judgment.[45]

This is a welcome development, considering that the implementation of the African Commission's decisions has been a thorny issue, as states have been reluctant to implement them. Recently, Botswana's Foreign Affairs Minister argued that the government of Botswana would not follow the African Commission's decision because the Commission is

40 Rule 51(3) African Court's Rules.

41 Rule 51(4) African Court's Rules.

42 Art 30 African Court Protocol.

43 Art 29 African Court Protocol.

44 B Kioko 'The African Union and the implementation of the decisions of the African Court on Human and Peoples' Rights' in *Interights Bulletin* (n 29 above) 8.

45 Art 31 African Court Protocol.

not a court.[46] Will states respond differently when the African Court issues binding judgments? Apart from its binding judgments, the Court's establishment impacts relevant stakeholders in different ways.

8 Future role of the African Court

The African system for the protection of human rights will no doubt be strengthened by a strong and effective court whose judgments will presumably be respected and executed by states. The African Court's judgments will have a wider impact, beyond the country against whom an application has been brought. The Court's existence not only adds to the number of regional human rights mechanisms in the region, but it also changes the dynamics within the African human rights system. For example, its existence impacts not only on the role of the African Commission, but it also impacts how states, civil society organisations and individuals interact with it.

8.1 For states

The African Court's powers as the main human rights overseer with enormous power is confirmed and clearly illustrated by states' reluctance to make the declaration under article 34(6). Their unwillingness to accept the competence of the African Court to consider individual petitions is testimony to the fact that states are wary of the powers of a strong mechanism that would hold them accountable for human rights violations.

At the AU Summits, state parties will, in addition to considering the African Commission's report, also have the opportunity to discuss the African Court's report. The Court is obliged to report to each regular session of the Assembly on its work and, in doing that, its report will include cases in which a state has not complied with the Court's judgment.

In the last few years, there has been extensive discussion of human rights reports at the AU Assembly with states fully engaging in the debates and being requested to comment on issues related to their countries. While this has led to delays in the adoption of the Assembly's Annual Activity Reports, it indicates a willingness on the part of states to engage with human rights issues. The African Commission's 17th Annual Activity Report of 2004 was adopted much later because the government of Zimbabwe disputed the contents of the African

46 F Rabkin 'Country reprimanded for denying critic access to court' *Business Day* 12 August 2010. Botswana's Foreign Minister, Phandu Skelemani, responding to the African Commission's decision in *Kenneth Good v Botswana* Communication 313/05, stated: 'We are not going to follow on the recommendation made by the commission; it does not give orders, and it is not a court. We are not going to listen to them.'

Commission's mission report.[47] There was a delay in the adoption of the Commission's 20th Annual Activity Report in 2006 with respect to a number of resolutions adopted on Ethiopia, Sudan, Uganda and Zimbabwe as these states wanted to add their comments to those resolutions and for these to appear in the report.[48] However, this is a sharp contrast to the past. According to Kioko, in those days the following situation prevailed:[49]

> The Chairperson of the Commission would present his Annual Activity Report to the Summit, most often at night and, invariably, there would be no takers from the floor when the issue was opened for discussion, even when the report alleged gross and massive violations of human rights. The Report of the Commission submitted to the Summit in 1995 indicated, *inter alia*, those gross and massive human rights violations had been committed in Nigeria and Cameroon. The delegations of Nigeria and Cameroon did not take the floor and there was no debate after the statement of the Chairperson to the Commission.

8.2 For the African Commission

Beyond its role as a litigant before the African Court, the African Commission will also have an opportunity to use the Court to deal with the non-implementation of its decisions by recalcitrant states. The Commission's Rules of Procedure provide that if a state is unwilling to comply with the Commission's decision within the period stated in rule 112, the Commission may submit the case to the African Court pursuant to article 5(1)(a) of the Protocol and inform the parties accordingly.[50]

8.3 Civil society organisations

Civil society organisations in the region were not only instrumental in lobbying for a court, but they welcomed its establishment as an institution that will offer greater human rights protection. Direct access to the African Court is still limited as only five states have complied with article 34(6), the provision of the African Court Protocol which requires states to make a declaration allowing direct individual access.[51] Efforts by NGOs to encourage the ratification of the Protocol and, importantly, compliance with the requirement under article 34(6), should continue. Applicants from Burkina Faso, Mali, Malawi, Tanzania and Ghana can directly access the Court. It should be recalled that the Court's

47 See comments by the government of Zimbabwe on the Report of the Fact-Finding Mission 18 http://www.achpr.org/english/activity_reports/activity17_en.pdf (accessed 22 June 2011).

48 See Resolutions adopted during the 38th ordinary session and responses from states 38 http://www.achpr.org/english/activity_reports/20th%20Activity%20Report.pdf (accessed 22 June 2011).

49 Kioko (n 44 above) 9-10.

50 Rule 118(1) African Commission's Rules of Procedure.

51 Art 34(6) African Court Protocol.

jurisdiction empowers it to consider all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the African Court Protocol and any other relevant human rights instrument ratified by the states concerned.[52]

The emergence of the African Court increases the possibility of forum shopping, particularly in respect of applications from the five countries in compliance with article 34(6). The African Court joins the African Commission and the African Committee of Experts on the Rights and Welfare of the Child as regional bodies which can be seized with cases pertaining to human rights violations.

9 Issues of interest to litigants before the African Court

The case section of the African Court's website provides information on how to submit cases to the Court. The downloadable application form is straightforward and requests applicants for a summary, a detailed application and prayers.[53] The case section of the Court's website also includes information on judgments and orders and pending cases.

For a vibrant third party intervener or *amicus curiae* practice to flourish before the African Court, potential interveners have to have information on the nature of cases pending before it.

A lack of legal representation is a key barrier to access to justice in the region. The African Court Protocol provides that any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require.[54] There should be clarity on the criteria that will be used to implement this provision.

9.1 Advisory opinions

Civil society organisations can also ask the African Court for advisory opinions.[55] While this procedure is not adjudicatory, it gives the Court an opportunity to contribute to the development of human rights standards by delivering advisory opinions on matters of regional significance.

State parties are presented with the opportunity of ensuring that the Court works and that it increasingly considers cases and renders judgments that they will implement. They can engage with the Court by ratifying the Protocol and allowing direct individual access. They

52 Art 3 African Court Protocol.

53 See the application form at http://www.african-court.org/fileadmin/documents/Application_form.pdf (accessed 20 September 2011).

54 Art 10(2) African Court Protocol.

55 Rule 68 Rules of Court.

should also consider requesting the Court to give advisory opinions on specific issues as was the case in the Inter-American system in early years.

10 Conclusion

Since its establishment, expectations for the African Court to deliver have been high. In this case, the Court's swift response to the African Commission is a good start. It is hoped that the Court will apply its mind to the arguments and evidence submitted by the Commission. The case would in the long term positively influence the lives of the many Libyans who have suffered human rights violations. The Court's decision would hopefully have a ripple effect on the wider region, particularly those countries undergoing similar civil strife.

This case, and generally the Court's arrival on the scene, herald a new era for the African human rights system. Over time, the Court's place in the African human rights system will hopefully help clarify the roles of the quasi-judicial mechanisms that can take cases before it as they progressively appear before it. This is why the support of stakeholders is crucial for the Court to effectively carry out its work. In the words of Dieng, the African Commission lacks neither ambition nor courage, but financial resources; hence it is important to ensure that the Court is spared the ills that plagued the Commission.[56]

One of the issues this matter against Libya raises is whether litigation as a strategy has any impact on situations of civil unrest or war in which serious and massive human rights violations are being committed. There may be no immediate impact of the case on raging civil strife when filed. However, these kinds of petitions not only highlight the issues at hand, but they serve to catalogue key human rights violations and explore appropriate remedies that a state should employ to remedy them.

This is the first case in which the African Court considers serious and massive human rights violations.[57] It is too early to tell what the extent of its impact on the ground will be. Cases of massive human rights situations filed before the African Commission[58] served to highlight

56 A Dieng 'Introduction to the African Court on Human and Peoples' Rights' *Interights Bulletin* (n 29 above) 6.

57 Rule 2 of the African Commission's Rules of Procedure states that serious or massive violations refer to grave human rights violations as distinguished by their scale and importance.

58 *Lawyers Committee for Human Rights v Zaire* (2000) AHRLR 71 (ACHPR 1994); *International Pen v Chad* (2000) AHRLR 66 (ACHPR 1994); *Organisation Mondiale Contre la Torture & Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996); *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998); *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

flagrant violations states have had to face head-on and in most cases are still grappling with.

The African Court's docket is still relatively small but; quite apart from its contribution to the development of human rights jurisprudence, its judgments will be indicators of its potential to offer greater human rights protection in the region. The Court's ability to live up to its mandate is closely linked to whether cases are forwarded to it. One thing that is clear is that for the Court to attain its goal and make its mark as a key player in the regional human rights system, it needs to receive applications.

At the moment, apart from the five countries that have complied with the declaration requirement allowing NGOs and individuals direct access to the African Court, the African Commission's role to supply it with cases is paramount. This may require internal changes, and the re-prioritisation of its activities and resources.

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Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far-reaching reform

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Summary

The article traces the evolution of FREP rules in Nigeria and highlights the problems which gave rise to FREP Rules, 2009. The article discusses the new rules and acknowledges that their objectives are laudable. For instance, the new Rules had to a large extent solved the thorny issues of how to commence human rights actions, expensive filing costs, service and limitation of action. However, the article notes that it is unusual for Rules of Court to have a preamble. The FREP Rules, 2009, therefore, depart from the usual standard. The fact that the laudable objectives of the FREP Rules are contained in a preamble may minimise their legal effect since preambles do not have the same legal force as substantive provisions. What is more, a number of provisions of the Rules are inconsistent with the provisions of the Constitution of Nigeria, 1999, and stand the risk of being declared null and void to the extent of their inconsistency in adversarial proceedings. There are a few provisions in the FREP Rules, 2009, which may be adverse to the interest of victims of human right violations compared to the FREP Rules, 1979. These include the abolition of application for leave of court and the requirement to front-load evidence together with a written address before commencing an action. These requirements

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may be counter-productive as counsel will require more time for research. Also, the Court of Appeal decision and the argument that FREP Rules have a constitutional flavour are misconceived and may be counter-productive as it will introduce rigidity into the review of the rule. The challenges posed with the enforcement of human rights in Nigeria are multi-faceted (constitutional, judicial and social). Therefore, a simplistic attempt to solve them through a review of the FREP Rules is surely inadequate. The article calls for legislative intervention to make the provisions of chapter II enforceable and to amend section 12(1) which requires domestication of treaties and conventions as a precondition for their enforcement.

> Human rights remain unfulfilled promises for large numbers of people throughout the world, despite their recognition in national constitutions and in widely ratified international treaties and regardless of the availability at the national level of judicial mechanism for their enforcement.[1]

1 Introduction

Constitutional commitments to human rights are futile unless enforced by and through institutions established for that purpose, particularly those empowered to interpret the constitution.[2] The human rights community in Nigeria is excited by the Fundamental Rights Enforcement Procedure Rules, 2009 (FREP Rules) recently made by the Chief Justice of Nigeria pursuant to section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999 (1999 Constitution). The FREP Rules attempt to deal with some of the shortcomings in the previous FREP Rules, those of 1979.[3]

The FREP Rules begin with an unusually long Preamble which, *inter alia*, enjoins judges to apply and interpret the Constitution, human rights laws and the FREP Rules in a liberal manner so as to advance the rights and freedoms guaranteed by the African Charter on Human and Peoples' Rights (African Charter) and the Universal Declaration of Human Rights (Universal Declaration). The courts are also enjoined to proactively pursue enhanced access to justice, especially for the poor, the illiterate, the uninformed, the vulnerable, the incarcerated and the unrepresented. An attempt is also made to liberalise the concept of *locus standi* in human right cases. This article argues that some of the improvements, though laudable, may have been exaggerated by

1 E Brems & CO Adekoya 'Human rights enforcement by people living in poverty: Access to justice in Nigeria' (2010) 54 *Journal of African Law* 258.

2 NJ Udombana 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5 *African Human Rights Law Journal* 47 55.

3 The FREP Rules, 1979 were made by the former Chief Justice Fatayi Atanda Williams in exercise of the power conferred on him by sec 42(3) of the Constitution of the Federal Republic of Nigeria, 1979. The Rules commenced on 1 January 1980. This was the first set of rules specifically made for the enforcement of fundamental rights in Nigeria.

commentators. The writer expresses doubts as to whether the FREP Rules are an appropriate vehicle for the enforcement of the provisions of the African Charter in Nigeria and posits that far-reaching reform is required for a robust enforcement system.

The article is divided into six sections. Section one is an introduction, while section two briefly considers the historical evolution of human rights provisions in Nigeria beginning with the 1960 Constitution. Section three discusses the main shortcomings of the FREP Rules of 1979 that gave rise to the latest version of the FREP Rules. Section four is devoted to major innovations contained in the FREP Rules, ostensibly aimed at addressing some of the shortcomings of the FREP Rules of 1979. Section five, which is the heart of the article, presents a legal analysis of a few critical legal issues arising from the provisions of the FREP Rules, with a view to assessing their strengths and possible weaknesses in advancing the laudable objectives of the reformers who promoted the revision of the FREP Rules.

2 Evolution of FREP Rules in Nigeria

Successive constitutions of Nigeria since independence in 1960 have always included provisions on human rights protection. The first Bill of Rights in Nigeria may be traced to the Independence Constitution of 1960. Shortly before independence, when the colonial government introduced the system of regional governments, minority ethnic groups expressed fears of domination and marginalisation. In response to these concerns, the colonial government set up a Minorities Commission in 1957.[4] Based on its recommendations, a bill of rights was

4 In the course of the quest for independence of Nigeria from British colonial rule, it became apparent that Nigerian political arrangements would be heavily weighted in favour of three groups that dominated the three colonial regions – North, East and West – into which the British imperial government had divided Nigeria. In the north, the Fulani allied with the Hausa whom they had ruled for a century before the onset of British colonialism in 1903, dominated the affairs of the region and persecuted the Tiv and several other minorities. In the east, the Igbo maltreated the Ibibio and other minorities. In the west, the Yoruba captured power and showed great hostility towards the Urhobo and Benin especially. Consequently, there were widespread fears expressed by such demographically smaller groups who became political minorities as a consequence of the 1954 federal arrangements in Nigeria. They feared that they would become politically endangered as minority groups following political independence from Great Britain. The British imperial government appointed a Minorities Commission in 1957 to look into such fears in the northern, eastern and western regions of Nigeria and to recommend measures for lessening them. In the course of its work, the Willink Commission submitted its report in 1958. See P Ekeh 'Willink Minorities Commission – Nigeria' (1957-58) Maps of Colonial Nigeria Showing Major Ethnic Groups and Minority Ethnic Areas http://www.waado.org/nigerdelta/ Maps/willink_commission/willink_minorities_commission.html (accessed 25 May 2011).

included in chapter III[5] of the 1960 Constitution[6] and the Republican Constitution of 1963.[7] A view has been expressed that this was done by the British colonial government to protect the economic interests of foreign nationals in an independent Nigeria. According to a group of East African lawyers:[8]

> In the late fifties and early sixties when the colonies were nearing independence, the issue of a bill of rights came to the fore. It was raised by the very power that had been suppressing it for years. But this time there was a good reason for it. The colonialists were leaving. The colonised were ascending into power. What of the property which accrued during the whole period of colonialism by the nationals and companies of the colonial powers? This had to be protected. Therefore the issue of the individual rights, especially the right to own property and the state protection of the same, became one of the main topics of discussion on independence. In the now notorious Lancaster House constitutional talk, the British made sure that a bill of rights was entrenched in the constitutions of its former colonies. Not that they cared a lot about individual rights and freedom of the indigenous people. They were concerned about the properties of their nationals still in the colonies after independence.

The truth of the above assertion was confirmed by the lukewarm attitude to the human rights issues in the post-colonial era in Nigeria. Only political rights were entrenched in the Constitution, while no serious thought was given to socio-economic rights.

Despite their constitutional recognition, the protection of human rights of the teeming majority of Nigerians was ineffective. This was exacerbated during the military interregnum[9] coupled with the absence of a specific expeditious procedure for the enforcement of fundamental rights.[10] In the absence of any rules promulgated by the federal and regional parliaments, fundamental rights litigation was commenced in several different ways, including an application under section 31(1) of the 1960 Constitution,[11] by writ of summons,[12] originating motion[13] or notice of motion.[14]

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5 Secs 17-32.

6 Brems & Adekoya (n 1 above) 2.

7 BO Nwabueze *Constitutionalism in the emergent state* (1973) 72.

8 'Legal Aids Committee. Essays in law and society' Faculty of Law, University of Tanzania, Dar es Salaam (1985) 12-13, quoted in F Falana *Fundamental rights enforcement in Nigeria* (2010) 4-5.

9 Nigeria gained independence in 1960. During the 51 years after independence Nigeria has been ruled by successive military governments for 29 years.

10 E Nwauche 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?' (2010) 10 *African Human Rights Law Journal* 502 503.

11 *Aoko v Fagbemi* (1961) 1 All NLR 400.

12 *Akande v Araoye* (1966) NMLR 215.

13 *Whyte v Commissioner of Police* (1966) NMLR 215.

14 *Akunnia v Attorney-General, Anambra State* (1977) 5 SC 161.

In 1979, upon the country's return to democracy after a spell under military rule, the Constitution of the Federal Republic of Nigeria, 1979 came into force on 1 October 1979. This Constitution not only retained the fundamental rights provisions in chapter IV, but also introduced a new dimension by providing for Fundamental Objectives and Directive Principles of State Policy in chapter II. Chapter II contains economic, social, cultural, educational, environmental and other objectives to which all the organs of government should adhere. However, these rights were expressly made non-justiciable by section 6(6)(c) of the Constitution. The then Chief Justice of Nigeria, Atanda Fatai Williams, invoked section 42(3) of the 1979 Constitution which empowered him to make rules for the practice and procedure for the High Court towards the enforcement of the provisions of chapter IV. The FREP Rules, 1979, came into effect on 1 January 1980.

3 Problems of enforcement under the FREP Rules, 1979

The FREP Rules, 1979, were intended to facilitate a speedier and less cumbersome resolution of complaints of human right abuse.[15] However, over the years it was discovered that the FREP Rules, 1979 had a number of shortcomings which were exploited by violators of human rights to justify their actions.[16] This problem was exacerbated by the rigid approach of the Nigerian courts in their interpretative role which turned the FREP Rules, 1979, into a highly technical and formal procedural instrument. Emerging from a military regime, the Nigerian courts, steeped in formalism and technicalities, were not well versed in the enforcement of human rights.[17] The 1989 Constitution and the extant 1999 Constitutions retained the provisions for Fundamental Rights and Fundamental Objectives and Directive Principles of State Policy in chapter IV and II respectively. The FREP Rules, 1979, continued to apply with all their shortcomings until 1 December 2009 when FREP 2009 became operative. Some of the shortcomings of the 1979 FREP Rules are discussed below.

3.1 Commencement of action

The requirement of leave of court was a condition for the commencement of a fundamental rights action under the 1979 Rules. Order 1 Rule 2(2) provided that '[n]o application for an order enforcing or securing enforcement within that state of any such rights shall be made unless leave therefore has been granted in accordance with this rule'. In *Udene*

15 Nwauche (n 10 above) 503.

16 Falana (n 8 above) xi.

17 Nwauche (n 10 above) 503-504.

*v U*gwu,[18] the Court of Appeal held that the requirement of leave is mandatory and cannot be regarded as a mere irregularity. This position has been affirmed by a plethora of cases.[19] All that is required of an applicant seeking leave of the court *ex parte* is to make out a *prima facie* case for the grant of leave. In order words, the applicant is only required to make a full disclosure of the essential facts giving rise to the application. Leave is granted at the discretion of the judge. Such discretion must, however, be exercised judicially and judiciously based on the facts and circumstances of each case. If leave was obtained on the basis of non-disclosure or suppression of material facts or fraud, any person who is adversely affected by the said order is at liberty to apply to set it aside.[20] The application for leave is regarded by some as circuitous and unnecessary in the enforcement of fundamental rights, a call which led to its abolition under the subsequent FREP Rules.

3.2 Limitation of action

Under the FREP Rules, 1979, an application for leave for the enforcement of fundamental rights must be brought within 12 months of the violation or threat of violation, or such other period as may be prescribed by any enactment, provided that where time has not been prescribed by any other law, the applicant could only make such application for leave out of time upon the satisfaction of the court of the cause of the delay.[21] In *Oguegbe v Inspector-General of Police*,[22] the application for leave to enforce the applicant's fundamental right to personal liberty was refused on the ground that the action was brought 30 months after the alleged infringement. The same principle has been applied in a plethora of cases.[23] Refusing to entertain actions for the enforcement of fundamental rights after only one year compared to six years under the Statute of Limitation for civil actions was a grave error on the part of the drafters of the FREP Rules, 1979.

3.3 Duplicity of processes

The FREP Rules, 1979, duplicated the process for the enforcement of fundamental rights. An applicant would first bring an *ex parte* application

18 (1997) 3 NWLR (Pt 491) 57.

19 See also *University of Calabar v Esiaga* [1987] 4NWLR (Pt 502) 719; *Madeibo v Nwakwo* [2001] 29 WRN 137; *Attorney-General of the Federation v Ajayi* [200] WRN 105; *WAEC v Akinkunmi* [2002] 7 NWLR (Pt 766) 327; (2202) 28 WRN 13, *Achebe v Nwosu* [2002] 19 WRN 42; *Ahmad v Sokoto State House of Assembly* (2002) 44 WRN 52 [2002] 15 NWLR (Pt 791) 519.

20 *Anigboro v Sea Truck (Nig) Limited* [2001] 10 WRN 78 94.

21 Order 1 Rule 3(1) FREP Rules, 1979.

22 (1999) 1 FHCLR 59.

23 *Fred Egbe v The Honourable Justice Adefarasin* [1985] 1 NWLR (Pt 3) 594 (1987) All NLR 1 (2003) 14 WRN 57; *SD Agboola & Others v Saibu & Another* (1991) 2 NWLR (Pt 175) 566; *Michael Obiefuna v Alexander Okoye* (1961) All NLR 357.

for leave, supported by a statement setting out his name, description, the relief sought, the grounds upon which the leave is sought, and a verifying affidavit confirming the facts he relied upon.[24] Secondly, if granted leave, he would have to bring another application on notice with virtually the same set of documents.[25] Where the motion on notice is not filed within 14 days after the grant of leave, the effect is that the leave has become spent and void. In such a situation, the applicant cannot be permitted to ask for an extension of time within which to file the motion or summons.[26] The needless and frustrating duplicity of processes under the 1979 Rules was a major drawback.

3.4 Jurisdictional dichotomy between the Federal High Court and the State High Court

The Rules created confusion on which is the appropriate court between the Federal High Court and the State High Court in the enforcement of fundamental rights in Nigeria. While Order 1 Rule 2 gave jurisdiction to a High Court in the state where the cause of action arose, Order 1 Rule 1 defined a court to mean the Federal High Court or the High Court of a state. In *Alhaji Lawan Zakari v Inspector-General of Police*,[27] the appellant had filed a notion *ex parte* at the High Court of the Federal Capital Territory, Abuja, seeking an order for leave to enforce his fundamental right to personal liberty. At the hearing of the motion, the learned judge *suo moto* asked the appellant's counsel to address him on whether the Court was competent to entertain the suit in view of section 230(1)(s) of Decree 107 of 1993 and section 42 of the 1979 Constitution. He therefore ordered the appellants to put the respondents on notice. The respondent subsequently filed a notice of preliminary objection challenging the jurisdiction of the Court to hear and determine the matter on the ground that only the Federal High Court could entertain it. The judge upheld the preliminary objection and dismissed the application. Dissatisfied with the decision, the appellant appealed to the Court of Appeal. The Court of Appeal set aside the decision and held that both the Federal and State High Courts are competent to entertain an application for the enforcement of fundamental rights. This principle was subsequently applied by the Supreme Court in *Jack v University of Agriculture, Makurdi.*[28] However, the Supreme Court in a subsequent decision held that actions against state governments cannot be instituted in the Federal High Court.[29]

24 Order 1 Rule 2(3) of FREP Rules, 1979.

25 Order 2 Rule 1(1) of FREP Rules, 1979.

26 See *Boniface Ezechukwu v Peter Maduka* (1997) 8NWLR (Pt 518) 625 670.

27 [2002] 6 NWLR (Pt 670) 666.

28 (2004) 14 WRN 91.

29 *Executive Governor, Kwara State v Mohammed Lawal* (2005) 25 WRN 142.

3.5 Dichotomy between principal/ancillary claims

According to Order 1 Rule 2 of the Rules, any person who alleges that any one of the fundamental rights provided for in the Constitution and which he is entitled to has been, is being or is likely to be infringed, may apply to the court in the state where the infringement occurs or is likely to occur, for redress. This provision has been interpreted to mean that only rights that are principally provided for under chapter IV of the Constitution could be enforced using the Rules. In other words, rights ancillary to those clearly spelt out under chapter IV of the Constitution could not be enforced under the previous Rules.[30]

However, in the celebrated case of *Garba v University of Maiduguri*,[31] the Supreme Court dismissed the contention of the respondent's counsel that the right to a fair hearing sought to be enforced by the appellants was ancillary to the right to studentship. In rejecting the argument, the Court held:

> There is no doubt that the action of the applicant is hinged on a constitutional provision, and I do not agree, with respect to Chief Williams, that this case is based solely on breach of contract ... It would be safer for the courts in this country to err on the side of liberalism whenever it comes to the interpretation of the fundamental provisions in the Constitution than to import some restrictive interpretation.

Ironically, the Supreme Court has overturned the ruling in the case of *Garba v University of Maiduguri*[32] on the spurious dichotomy between principal and ancillary claims. Thus, it has been held that the right of students to a fair hearing cannot be enforced under the Fundamental Rights Enforcement (Procedure) Rules 2009.[33] In *University of Ilorin v Oluwadare*,[34] the Supreme Court (*per* Onu JSC) stated:

> The right to studentship not being among the rights guaranteed by the 1999 Constitution, the only appropriate method by which the respondent could have challenged his expulsion was for him to have commenced the action with a writ of summons under the applicable rules of court.

It is difficult to agree with the above reasoning. It was not doubted that the respondents were human beings before they became students. The fact that they were students only relate to the circumstances in which their rights to a fair hearing were violated. The circumstances in which the rights of different people could be violated will of course vary from one case to the other. The respondents' case therefore was not based on their right to studentship as such, but a right to be heard

30 See *Gongola State v Tukur* [1989] 4 NWLR (Pt 117) 517; *Anigboro* (n 20 above).

31 [1986] 2 NWLR (Pt 18) 559.

32 As above.

33 Falana (n 8 above) 70.

34 (2006) 45 WRN 145. See also *Akintemi & Others v Prof CA Onwumechili & Others* (1985) All NLR 94 (1985) 1 NWLR (Pt 1) 68. See also the case *of Egbuonu v BRTC* (1997) 12 NWLR (Pt 531) 29 50.

before their guilt or innocence was determined by the appellant. The fact that the respondents had prayed the court to forestall their rustication before the determination of the suit does not make the right to studentship the principal claim. If the appellant had rusticated the respondents after subjecting them to a disciplinary procedure which was fair and transparent, it would have been futile for them to invoke the FREP Rules on the ground that their right to a fair hearing had been breached. It is unfortunate that the judges had chosen to impose a limitation on their interpretative power which is not apparent from the wording and language of the Constitution.

3.6 Committal proceedings

Order 6 Rule 2 of the 1979 Rules provided as follows:

> In default of obedience of any order made by the court or judge under these Rules, proceedings for the committal of the party disobeying such order will be taken. The Order of Committal is in the Form 6 of the Appendix.

There was a *lacuna* in the Rules on the procedure to be adopted in initiating contempt proceedings against a party who is in disobedience of a court order. In *Malcom Fabiyi v University of Lagos*,[35] the respondent objected to the filing of the contempt proceedings under Order 6 Rule 2 on the ground that Forms 48 and 49 had not been served on the respondents pursuant to the provisions of the Lagos State High Court (Civil) Procedure Rules. The learned judge, Fafiade J, dismissed the preliminary objection on the grounds that service of such forms was not required under the FREP Rules. In the face of this *lacuna*, the courts had to resort to the relevant High Court (Civil Procedure) Rules with respect to committal proceedings. In *Bonnie v Gold*,[36] Akintan JCA (as he then was) stated:

> ... as the Fundamental Rights Rules, is silent on the procedure to be followed in enforcing the order for contempt made under it, the appropriate rules made for the enforcement of such order in the High Court (Civil Procedure) Rules would be applicable. It follows therefore that the appropriate Forms 128 and 129 would have to be issued and properly served on the respondent. Thus, in the instant case, the appropriate rules and the forms prescribed in the High Court (Civil Procedure) Rules, 1988 of Bendel State, would be applicable. The appellants failed to follow the rules laid down in the aforementioned High Court (Civil Procedure) Rules. That omission therefore vitiates the application. The lower court was therefore right in dismissing the said application.

In practice, forcing victims of human rights violations to fall back on the High Court Rules on enforcement of judgment usually results in the loss of valuable time. Since the objective of the FREP rules is to facilitate the

35 Unreported Suit ID/33m/93 of 15 June 1994.

36 (1996) 8 NWLR (Pt 465) 230 237.

speedy enforcement of fundamental rights, it is counterproductive to have a speedy declaration of rights and a slow enforcement of rights.

3.7 Requirement of *locus standi*

Order 1 Rule 2 of the FREP Rules, 1979, provided as follows:

> Any person who alleges that any of the fundamental rights provided for in the Constitution and to which he is entitled, has been, is being, or is likely to be infringed may apply to the court in the state where the infringement occurs or is likely to occur, for redress.

In furtherance of this rule it has been held in a plethora of cases[37] that it is the person whose fundamental rights have been, are being or are likely to be violated that can challenge such a violation. The FREP Rules, 1979, contained many assumptions, such as the capacity of vulnerable people to pay exorbitant filing fees, the sensitivity of a judge to the plight of a detainee in police custody, and the compliance of police officers to judicial.

However, some judges have managed to save applications filed on behalf of human right victims through judicial activism. In *Captain SA Asemota v Col SL Yesufu and Another*,[38] the wife of a detained army officer had sued in her own name to enforce the fundamental right of her husband to personal liberty. The learned trial judge, Somolu J (as he then was), amended the application *suo moto* by substituting the husband's name for hers in order to bring it in conformity with the FREP Rules.

In *Richard Oma Ahonarogo v Governor of Lagos State*,[39] the applicant, a legal practitioner, filed an application for the enforcement of the right to life of the 14 year-old Augustine Eke who was convicted of armed robbery by the Firearms and Robbery Tribunal in Lagos State. The main ground of the application was that the convict could not be sentenced to death as he was a minor by virtue of section 368 of the Criminal Procedure Law of Lagos State. The preliminary objection of the respondent challenging the *locus standi* of the applicant and the jurisdiction of the court was dismissed by Onalaja J (as he then was). It was the judge's view that the applicant, as a legal practitioner, had the *locus standi* to enforce his client's fundamental right to life.

In *Ozekhome v The President*,[40] the 2nd to 24th applicants were detained under the State Security (Detention of Persons) Decree 2 of 1984. The *locus standi* of the first applicant in the action was challenged

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37 *Olusola Oyegbemi v Attorney-General of the Federation* (1982) 3 NCLR 895; *Alhaji Shugaba Abruraham Darman v Minister of Internal Affairs* (1981) 2 NCLR 459; *University of Ilorin* v *Oluwadare* [2003] 3 NWLR (Pt 806) 557; *Governor of Ebonyin State v Isuama* 92003) 8 WRN 123 (2002) 19 WRN 42.

38 (1981) 1 NSCR 420.

39 Unreported case. See JHRLP Vol 4 Nos 1, 2 & 3, cited by Falana (n 8 above) 31.

40 1 NPILR 345 359.

by the respondent. In dismissing the preliminary objection, Segun J (as he then was) said:

> The 2nd to 24th plaintiff/respondents are in jail and they have sufficient interests to come out. To get out, they need the services of the 1st plaintiff/respondent – a legal practitioner. This lawyer has statutory rights to perform certain duties as a legal practitioner to his clients. These statutory rights are clearly spelt out in section 2 of the Legal Practitioners Act 1975 (see also Rules 7,4,14C and 29 of the Rules of Professional Conduct in the Legal Profession made pursuant to the Legal Practitioners Act, 1975). The combined effect of the law and the Rules show that the 1st plaintiff/respondent has sufficient interest in the matter. He has been briefed and he is now taking steps to ensure success of the litigation. I hold that he is an interested party on the face of the summons.

A strict adherence to the doctrine of *locus standi* cannot be justified under article 29(2) of the African Charter, which imposes a duty on every individual to serve their community by placing their physical and intellectual abilities at its service.[41] Article 27(2) further provides that the rights and freedom of each individual shall be exercised 'with due regard to the rights of others, collective security, morality and common interests'.

The activist views of the learned judges in the above three cases are indeed commendable. Rather than invoking the literal rules of interpretation which inexorably would have led to the striking out of these cases, their interventions have enthroned substantive justice above technical justice. These cases are also significant in the sense that they clearly indicate that not all the judges can be said to be guilty of the sweeping charge of narrow-mindedness and retrogression in interpreting the provisions of the FREP Rules.

4 Changes introduced by the FREP Rules, 2009

In order to address the shortcomings in the FREP Rules, 1979, the Nigerian Bar Association and the human rights community pleaded for the review of the Rules. The request for the amendment of the Rules was acted upon by the immediate past Chief Justice of Nigeria, the Honourable Legbo Kutigi, who enacted the new FREP Rules in 2009.[42] The new FREP Rules contain some provisions which are meant to address some of the problems of the FREP Rules, 1979.

4.1 Expansive preamble

The principal or overriding objectives of the FREP Rules are outlined in the Preamble. They relate mainly to the obligations of the court in the

41 L Dibia & E Andah 'The new Rights Enforcement Rules – Goodbye law triumphant, justice prostrate!' http://www.allAfrica.com (accessed 2 June 2011).

42 Falana (n 8 above) xi.

hearing, interpretation and adjudication of cases brought under the Rules. The court and parties shall 'constantly and conscientiously' give effect to the overriding objectives of the rules 'at every stage' of human right actions, especially 'whenever it exercises any power given to it by these rules or any other law and whenever it applies or interprets any rule'.[43] In sum, the courts are enjoined in paragraph 3 of the Preamble to observe the following objectives:

(a) to expansively and purposely interpret and apply the Constitution, especially chapter IV, as well as the African Charter with a view to advancing and affording the protection intended by them;
(b) to respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the court is aware, including the African Charter on Human and Peoples' Rights and the Universal Declaration of Human Rights;
(c) to make a consequential order as may be just and expedient;
(d) to pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated and the unrepresented;
(e) to encourage and welcome public interest litigation in the human rights field. In particular human rights activists, advocates or groups and non-governmental organisations may institute human rights actions on behalf of any potential applicants. No human rights case may be dismissed or struck out for want of *locus standi*;
(f) to pursue the speedy and efficient enforcement of and realisation of human rights; and
(g) to give utmost priority to human rights cases especially those involving liberty.

It is important to point out that the court is called upon to observe the foregoing 'whenever it exercises any power given to it by these rules or any other law and whenever it applies or interprets any rule'.

4.2 Commencement of action

Human rights actions may now be initiated by any originating process acceptable to the court. Thus, it is no longer open to the respondent to seek to strike out an application simply on the basis that it was commenced via a writ of summons or originating motion or originating summons. The filing fee has also been reduced drastically[44] and may not be more than an equivalent of about US $10 compared to about US $300 under the FREP Rules, 1979.[45]

43 See para 1 Preamble to FREP Rules.
44 See Appendix A to the FREP Rules.
45 Nwauche (n 10 above) 511.

The requirement of leave which was a *sine qua non* in the FREP Rules, 1979, has been dispensed with under the 2009 FREP Rules. Thus, by virtue of Order II Rule I of the new FREP Rules, an applicant shall commence an action by filing a motion on notice or any other originating process accepted by the court. The application shall be accompanied by a statement, affidavit in support, with or without exhibits and a written address. Also, the confusion created by the filing of a verifying affidavit has now been removed.[46] The application shall be fixed for hearing within seven days, thus obviating the need to file an affidavit of urgency. However, in situations where exceptional hardship may be caused to the applicant before the service or hearing of the substantive application, a motion *ex parte* for an interim order may be filed.[47]

4.3 Curtailing delaying tactics of the parties

Unlike what obtained under the FREP Rules, 1979, there is little room for delaying tactics on the part of any respondent. Under Order II Rule 6, a respondent who has a preliminary objection is now required to file it with a written address with or without a counter-affidavit. Upon being served with such processes, the applicant is required to file and serve an address on points of law within five days with or without a further affidavit. Thus, the preliminary objection and the main application will be heard together on the same day. The hearing is conducted based on the parties' written addresses,[48] while parties shall be given a maximum of 20 minutes to make an oral argument 'on matters not contained in their written addresses'.[49] In order to ensure that the non-attendance of counsel does not delay proceedings, the court may, either on its own or upon the application of the other counsel, deem the written address of the party whose counsel is absent as having been adopted. A party shall be deemed to have notice of the date fixed for the adoption of written addresses if he or his counsel was present in court on the last adjourned date where the case was fixed for that day.[50]

4.4 Service of application on the respondent

Generally, after an action has been filed, it must be served on the defendant. Without such service, he may not know that the plaintiff had sued him and for what. The object of the service is, therefore, to give notice to the defendant, so that he may be aware of and be able to defend the

46 'Prospect and challenges of new Fundamental Rights Rules' *The Punch* 22 February 2010.

47 See Order IV Rule 3 FREP Rules.

48 Order XII Rule 1 FREP Rules.

49 Order XII Rule 2 FREP Rules.

50 Order XIII Rule 3 FREP Rules.

action.[51] Failure to serve an originating process is a fundamental vice which entitles the other party *ex debito justitiae* to have the process set aside as a nullity.[52] Order V Rule II of the FREP Rules departs from the general principle on service of originating through personal service by providing that '[t]he application must be served on all the parties directly, so long as a service duly effected on the respondent's agents will amount to personal service on the respondent'.

This provision will undoubtedly make the service of the originating process on the respondent easier where the respondent has an identifiable agent. In view of the overriding objective of giving the provisions of the rules expansive meaning, the court should have no difficulty in deeming the service of an application on the Commissioner of Police as effective service on the Inspector-General of Police. In the case of a government agency or corporate entity, service on the state office or branch may be deemed as effective, especially where the respondent is aware of the suit and is represented in court.

4.5 Limitation of action

Just as time does not run against the state in the prosecution of criminal cases, the application for the enforcement of fundamental rights can no longer be affected by any statute of limitation whatsoever.[53]

5 Critique of the new FREP Rules

The fundamental objectives of FREP Rules are contained in the Preamble. First, it is unusual for any rules of court to espouse any fundamental objectives as such. What is usual is for the Rules to succinctly state the relevant section of the enabling law pursuant to which the Rules were made.[54] The FREP Rules may therefore go down in Nigerian history as the first rules of court to have a preamble. This is not really an objection, except that the nature of a preamble does not give assurance that the contents have much legal weight.

Since the lofty overriding objectives of FREP Rules are listed in the Preamble, the pertinent question is what legal effect(s) a preamble has. A preamble is a mere introductory statement that carries little or no weight in law. A preamble is too abstract and is usually just a state-

51 *United States Press Ltd v Adebanjo* (1969) 1 All NLR 431 432.

52 See *Obimanure v Erinosho & Another* (1966) 1 All NLR 250; *Mbadinuju v Ezuka & Another* (1994) 10 SCNJ 109 128; *Skenconsult v Ukey* (1980) 1sc 6 26; *Adeigbe & Another v Kusimo & Another* (1965) NMLR 284.

53 See Order III Rule 2 FREP Rules, 2009.

54 Eg, the FREP Rules, 1979 began by stating: 'In exercise of the powers conferred by section 42 subsection 3 of the Constitution of the Federal Republic of Nigeria, the Chief Justice of Nigeria hereby makes the following Rules.'

ment of fact, unlike the wording of the actual law.[55] Thus, the so-called Preamble of the FREP Rules does not really conform to a preamble. In the case of *Jacobson v Massachusetts*[56] it was held that the Preamble does not have any legal power within the Constitution. It is an introduction to the document as a whole and does not, in and of itself, allow the exercise of any kind of legal power. Even with regards to the preamble of a constitution, the only power that can arise from the Constitution must come from elsewhere, not its Preamble. Whilst the spirit of a constitution can be understood through its preamble, this is not so for actual legal power which would usually not arise from a preamble. This means that the preamble to a constitution may provide a strong basic framework for understanding the intent behind the Constitution as a whole, but it cannot be taken as directly legally relevant in providing rights or powers either to the citizens or the state. It follows that the Preamble to the FREP Rules cannot provide any substantive rights or powers as it purports to do.

It is important to take a closer look at the provisions of section 46 of the 1999 Constitution pursuant to which the FREP Rules were made in order to see whether some of the provisions of the FREP Rules are not *ultra vires* the Chief Justice. The section provides:

> (1) Any person who alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in any state in relation to him may apply to a High Court in that state for redress.
> (2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcement or securing the enforcing within that state of any right to which the person who makes the application may be entitled under this chapter.
> (3) The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this section.
> (4) The National Assembly –
> (a) may confer upon a High Court such powers in addition to those conferred by this section as may appear to the National Assembly to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by this section; and
> (b) shall make provisions –
> (i) for the rendering of financial assistance to any indigent citizen of Nigeria where his right under this chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim; and
> (ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real.

55 See http://www.eng.hi138.com/Legal Papers/State/Constitution Law Papers (accessed 17 June 2011).

56 197 US 11 (1905).

It is clear from the provisions of section 46(3) that the power of the Chief Justice of Nigeria can only be exercised with respect to 'practice and procedure'. Rules of court, by nature, set out standards that govern the initiation and conduct of a civil or criminal law suit in the court. They cover the methods of commencing an action, prescribe what kind of processes are required of the parties, the timing and manner in which these must be done, the conduct of trials, the process for judgment, and how the courts and its key official(s) must function.[57] Section 46(4)(a) of the 1999 Constitution makes it clear that it is the responsibility of the National Assembly to confer additional powers on the High Court for the purpose of enabling the court to exercise its jurisdiction more effectively. Sections 46(4)(b)(i) and (ii) even go as far as authorising the National Assembly to make laws that will render financial assistance to indigent citizens. As we can see, these are some of the laudable objectives of the new FREP Rules. It follows that the National Assembly as an important government institution must intervene by making the requisite law in order to achieve its desired objectives. Fortunately, the Supreme Court had held in *Attorney-General of Ondo State v Attorney-General of the Federation and Others*[58] that the Supreme Court sustained the constitutionality of the Independent Corrupt Practices (and Other Related Offences) Commission Act, 2000,[59] enacted pursuant to section 15(5) of chapter two and item 60(a) on the exclusive legislative list of the 1999 Constitution. The import of this decision is that the provisions of chapter II of the Constitution can be made enforceable to the extent that they have been enacted into law. Thus, in the absence of any such law by the National Assembly aimed at invigorating the enforcement of fundamental rights, there is a limit to which the Chief Justice of the Federation can intervene. In this regard, it is arguable that any provision of the FREP Rules that is beyond practice and procedure is *ultra vires*, null and void.

The FREP Rules have set a high standard for the court by seeking to override the express provisions of the 1999 Constitution on the extent of the judicial powers of the courts of superior records contained in section 6(6)(c) of the 1999 Constitution as follows:

> 6 (1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.
>
> ....
>
> (6) The judicial powers vested in accordance with the foregoing provisions of this section –
>
> ....

57 See 'Civil procedure' en.wikipedia.org/wiki/Civil_procedure (accessed 13 March 2010).

58 [2002] 9NWLR (Pt 772) 222 (2002) 27 WRN 1 (2002) 6 SC (Pt 1) 1 (2002) FWLR (Pt 11) 1972.

59 Cap C31 LFN, 2004.

(c) shall not. except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in chapter II of this Constitution.

The above provision is a constitutional limitation on the extent of judicial powers vested in all the courts of record in Nigeria, including the Supreme Court. In furtherance of these provisions, while the infringement of any of the rights contained in chapter IV can be challenged in an appropriate High Court, the economic, social and cultural rights which are contained in chapter II of the Constitution are not justiciable. In *Archbishop Olubunmi Okogie v Lagos State*,[60] the Court of Appeal had this to say:[61]

> The fundamental objectives identify the ultimate objectives of the nation and the Directive Principles lay down the policies which are expected to be pursued in the efforts of the nation to realise the national ideals. While section 13 of the Constitution makes it a duty and responsibility of the judiciary, among other organs of government, to conform to and apply the provisions of chapter II, section 6(6)(c) of the same Constitution makes it clear that no court has jurisdiction to pronounce any decision as to whether any organ has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy. It is clear therefore that section 13 has not made chapter II of the Constitution justiciable.

In other words, the provisions of chapter II of the Constitution, which contain some socio-economic rights, are unenforceable in court and it is only the civil and political rights contained in chapter IV of the Constitution that can be enforced in a court of law.[62] Thus, the FREP Rules made by the Chief Justice of Nigeria in the exercise of his judicial functions cannot under any guise enlarge the scope of the judicial powers vested in the courts.

Also, the FREP Rules seek to expressly override the provisions of section 12(1) on the conditions for the application of international treaties and conventions in Nigeria. Section 12(1) provides:

(1) No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.
(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

The above provisions entrench the principle of dualism. The essential purport of this is that when Nigeria signs any international treaty or convention, it does not become binding law in Nigeria unless and until

60 (1981) 2 NCLR 337 350.

61 *Attorney-General of Ondo State v Attorney-General of the Federation & Others* (n 58 above).

62 See *Okogie v Attorney-General of Lagos State* (1981) 2 NCLR 350*; Oronto Douglas v Shell Petroleum Development Company Limited* (1999) 2 NWLR (Pt 591) 466.

it is enacted into law in Nigeria as an Act of the National Assembly.[63] Thus, any treaty signed into law by the executive cannot supersede the provisions of the Federal Republic of Nigeria. However, paragraph 3(b) of the Preamble to the FREP Rules mandates courts to 'respect' municipal, regional and international bills of rights cited to it or brought to its attention or of which the court is aware.

The meaning of the word 'respect' is not clear. It certainly does not seek to impose an obligation, otherwise mandatory terms such as 'shall' would have been used. It is reasonable therefore to construe the word as persuasive rather than directory. The provisions would be open to attack if the intention is to make international human rights instruments directly enforceable in Nigerian courts. It is worth noting that the provision does not even require Nigeria to be a signatory to such international instruments. It remains to be seen how an international instrument may be validly enforced by the Nigerian courts when the Constitution clearly stipulates that any such instrument must first be domesticated for it to have the force of law.

The FREP Rules, having been made by the Chief Justice of Nigeria, are akin to subsidiary legislation. It has been argued, especially by human rights activists, that since the Chief Justice derives his power to make the Rules under section 46(3) of the 1999 Constitution, the Rules have been elevated from the status of mere subsidiary legislation to the same status as the Constitution. This view finds support in the Court of Appeal case of *Abia State University v Anyaibe*,[64] where it was stated that the Rules form part of the Constitution and therefore enjoy the same force of law as the Constitution.

With due respect, this cannot be a correct statement of the law. Assuming (without conceding) that the FREP Rules are an integral part of the Constitution, this will not make the provisions of the Rules override the express provisions of the Constitution. Sections 1(1) and 1(3) of the 1999 Constitution entrench the principle of supremacy of the Constitution thus:

> (1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.
>
> ....
>
> (3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.

Based on this provision, it is submitted that all the provisions of the FREP Rules which are inconsistent with the Constitution stand the risk of being declared as null and void to the extent of their inconsistency.

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63 See generally the provisions of sec 14(1)(2) of the 1999 Constitution of the Federal Republic of Nigeria.

64 (1996) 3 NWLR (Pt 439) 646.

The decision of the Court of Appeal that the FREP Rules have a constitutional flavour should be re-examined because of its possible negative implications for the future development of the Rules. If the argument is followed to its logical conclusion, it would mean that, once made, the rules can only be amended through the rigorous process of constitutional amendment contained in section 9 of the 1999 Constitution. This has been the fate of the four statutes[65] which are deemed by the provisions of section 315(5) of the 1999 Constitution as forming part of the Constitution. If the argument that the Rules have a constitutional flavour is sustained, it follows that the entire body of FREP Rules stand the risk of being declared unconstitutional having been 'amended' in a manner that is inconsistent with the provisions of section 9 of the 1999 Constitution.

The FREP Rules are still open to attack on the ground that the objective of simplicity is not sufficiently manifest from its provisions. Considering the commencement of action, besides the abolition of the requirement of leave and verifying affidavit, the applicant is still required to produce almost the same set of court processes in addition to a written address. An appreciable degree of duplication is still involved in the process. For instance, while the reliefs would have been stated in the originating process, the applicant is still required to file a statement setting out the name and description of the applicant, the reliefs sought, and it must also be supported by an affidavit setting out the facts upon which the application is made.[66] What should form the contents of the statement has given rise to controversy in the past, leading to some meritorious cases being struck down on technical grounds. This has not been specifically addressed by the Rules. Order 9(1), however, provides that failure to comply with the requirement as to time, place, manner or form shall be treated as an irregularity and may not nullify proceedings except as it relates to the mode of commencement of the application. This connotes that the provisions as to the commencement must still be strictly complied with. It will further the objective of simplicity and access if these technical documents are dispensed with altogether since their contents can be taken care of, especially in the affidavit and address. One would also have expected a procedure whereby a victim will only have to fill out some forms to activate the court process on an urgent basis while the filing of a written address should be made optional. Also, a more careful examination of the new requirements for commencement of action under the FREP Rules would reveal that they may be disempowering and counter-productive for a victim of a human rights violation. Application for leave is now abolished while the application must be accompanied by a written address. The requirements for leave under the FREP Rules proved to be a window for victims

65 The National Youth Service Corps Decree 1993, the Public Complaints Commission Act, the National Security Agencies Act and the Land Use Act.

66 Order II R 3 FREP Rules, 2009.

to obtain swift 'temporary' relief. This is because the application for leave is made *ex parte* and, once granted, operates as a stay until the return date when the motion on notice is fixed for hearing. In practice, the hearing of the case is usually delayed by a combination of factors, and meanwhile the victim continues to enjoy his or her freedom until the return date or such time that the case is finally disposed off. In the majority of cases, most respondents may not even bother to respond, in which case the victim continues to enjoy his freedom on account of the interim order.

Although the requirement of filing a written address in support of the application must have been made with the altruistic intention of speeding up the process, it may have unwittingly created some stumbling blocks along the path of enforcement of fundamental rights. In sum, the applicant under the 2009 Rules is required to front-load his case. The idea of front-loading is that the applicant must have obtained all his evidence, completed his research; and prepared all the processes and authorities before approaching the court. The natural implication is that the applicant's counsel will now require more time to prepare and file his application. This is also true even for extremely urgent cases. Therefore, a victim of a human rights violation who seeks the intervention of the court will now have to wait much longer to get even temporary reprieve.

6 Conclusion

It took the Chief Justice of Nigeria about two decades to respond to the challenges posed by the FREP Rules, 1979. While the FREP Rules, 1979, indeed started a dynamic process of the enforcement of fundamental human rights, a number of unintended stumbling blocks soon emerged along its path, thereby making the road towards the attainment of its objective bumpy and difficult for many victims of human rights violations. The problems of the FREP Rules of 1979 may be divided into four types, namely, (i) those that are rooted in the Constitution; (ii) those that are self-inflicted by the courts; (iii) those that are inherent in the Rules; and (iv) general problems of societal ordering and social justice.[67] Apparently in an attempt to cover lost ground and to establish more vibrant and efficient rules, the Chief Justice, the NBA and the tribe of human rights activists seem to have gone overboard in expressing their good intentions in the new FREP Rules. Thus, the FREP Rules contain a number of innovative provisions which are tantamount to an amendment of the provisions of sections 6(6)(c) and 12(2) of the 1999 Constitution. The Rules in its Preamble enjoin the courts to respect the provisions of chapter II of the 1999 Constitution, the African

67 This classification has been adopted for convenience and ease of understanding of the nature of the problems.

Charter and all international conventions and treaties notwithstanding the requirement of domestication in section 12(2) of the 1999 Constitution.

This article argues that the decision of the Court of Appeal that seeks to put the FREP Rules on the same juridical pedestal as constitutional provisions is misconceived and even counterproductive. Although the principle established in this case indeed meets the demands of justice, it is imperative to give the FREP Rules a proper and correct juridical classification in order to appreciate the extent of what is achievable via that route. Calling a spade a spade and not a garden egg, the FREP Rules are nothing but subsidiary legislation. It should be clear that some of the problems which the FREP Rules address are far beyond what is achievable through subsidiary legislation. For instance, no matter how far the FREP Rules are stretched, they are incapable of overriding the express provisions of the 1999 Constitution. If the FREP Rules can indeed be deployed to make the socio-economic rights provisions of chapter II of the Constitution enforceable and to give direct effect to the provisions of international treaties on human rights to which Nigeria is not even a signatory, this will render the provisions on amendment of the Constitution to a large extent redundant. There exists a groundswell of decisions by the Supreme Court which proclaim the supremacy of the Constitution above any law, whether local or international.

While the writer identifies with all the objectives of the FREP Rules espoused in the Preamble, their attainment in practical terms would require far-reaching constitutional reform, including the amendment of the provisions of sections 6(6)(c) and 12(1)(a) which may serve as obstacles to the enforcement of the provisions of chapter II of the Constitution and direct application of the provisions of international treaties in Nigeria without any need for local domestication. Nigerians must rather restructure their constitutional framework in such a way that it will not only espouse, but give real effect to the socio-economic rights and aspirations of the majority of the people in the struggle for survival with little or no awareness of the Constitution. Beyond making socio-economic rights justiciable, a functional social security system must be developed to take care of those who are poor and vulnerable and insure everyone against the risk and cost of illness. Until this is done, whatever judicial or executive interventions that are made towards the enforcement of fundamental rights would be like a flash in a pan. I hope it will not take another two decades for Nigeria to chart the right course in this regard.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Ubuntu as a moral theory and human rights in South Africa

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Summary

There are three major reasons why ideas associated with ubuntu are often deemed to be an inappropriate basis for a public morality in today's South Africa. One is that they are too vague; a second is that they fail to acknowledge the value of individual freedom; and a third is that they fit traditional, small-scale culture more than a modern, industrial society. In this article, I provide a philosophical interpretation of ubuntu that is not vulnerable to these three objections. Specifically, I construct a moral theory grounded on Southern African world views, one that suggests a promising new conception of human dignity. According to this conception, typical human beings have a dignity by virtue of their capacity for community, understood as the combination of identifying with others and exhibiting solidarity with them, where human rights violations are egregious degradations of this capacity. I argue that this account of human rights violations straightforwardly entails and explains many different elements of South Africa's Bill of Rights and naturally suggests certain ways of resolving contemporary moral dilemmas in South Africa and elsewhere relating to land reform, political power and deadly force. If I am correct that this jurisprudential interpretation of ubuntu both accounts for a wide array of intuitive human rights and provides guidance to resolve present-day disputes about justice, then the three worries about vagueness, collectivism and anachronism should not stop one from thinking that something fairly called 'ubuntu' can ground a public morality.

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> [W]e have not done enough to articulate and elaborate on what *ubuntu* means as well as promoting this important value system in a manner that should define the unique identity of South Africans.
>
> Former South African President Thabo Mbeki, Heritage Day 2005

1 Introduction

Despite President Mbeki's call, many jurists, philosophers, political theorists, civil society activists and human rights advocates in South Africa reject the invocation of *ubuntu*, tending to invoke three sorts of complaints.

First, and most often, people complain that talk of *ubuntu* in Nguni languages (and cognate terms such as *botho* in Sotho-Tswana and *hunhu* in Shona) is vague. Although the word literally means humanness, it does not admit of the precision required in order to render a publicly-justifiable rationale for making a particular decision. For example, one influential South African commentator suggests that what *ubuntu* means in a legal context 'depends on what a judge had for breakfast', and that it is 'a terribly opaque notion not fit as a normative moral principle that can guide our actions, let alone be a transparent and substantive basis for legal adjudication'.[1] This concern has not exactly been allayed by a South African Constitutional Court justice who has invoked *ubuntu* in her decisions, insofar as she writes that it can be grasped only on a 'know it when I see it' basis, its essence not admitting of any precise definition.[2]

A second common criticism of *ubuntu* is its apparent collectivist orientation, with many suspecting that it requires some kind of group-think, uncompromising majoritarianism or extreme sacrifice for society, which is incompatible with the value of individual freedom that is among the most promising ideals in the liberal tradition. Here, again, self-described adherents to *ubuntu* have done little to dispel such concerns, for example, an author of an important account of how to apply *ubuntu* to public policy remarks that it entails 'the supreme value of society, the primary importance of social or communal interests, obligations and duties over and above the rights of the individual'.[3]

A third ground of scepticism about the relevance of *ubuntu* for public morality is that it is inappropriate for the new South Africa because of its traditional origin. Ideas associated with *ubuntu* grew out of small-scale, pastoral societies in the pre-colonial era whose world views were based

1 E McKaiser 'Public morality: Is there sense in looking for a unique definition of *ubuntu*?' *Business Day* 2 November 2009.

2 Y Mokgoro '*Ubuntu* and the law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal* 2.

3 GM Nkondo '*Ubuntu* as a public policy in South Africa' (2007) 2 *International Journal of African Renaissance Studies* 90.

on thickly spiritual notions such as relationships with ancestors (the 'living-dead'). If certain values had their source there, then it is reasonable to doubt that they are fit for a large-scale, industrialised, modern society with a plurality of cultures, many of which are secular.[4]

Call these three objections to an *ubuntu*-oriented public morality those regarding 'vagueness', 'collectivism' and 'anachronism'. It would be incoherent to hold all three objections at the same time; after all, the more one claims that *ubuntu* is vague and admits of any interpretation, the less one can contend that it is inherently collectivist. Even so, the three objections are characteristic of discourse among professionals, elites, intellectuals and educated citizens in general, and hence are worth grouping together.

In this article, I aim to articulate a normative-theoretical account of *ubuntu* that is not vulnerable to these three objections. I construct an ethical principle that not only grows out of indigenous understandings of *ubuntu*, but is fairly precise, clearly accounts for the importance of individual liberty, and is readily applicable to addressing present-day South Africa as well as other societies. To flesh out these claims, I explain how the *ubuntu*-based moral theory I spell out serves as a promising foundation for human rights. Although the word *ubuntu* does not feature explicitly in the Constitution that was ultimately adopted in South Africa,[5] my claim is that a philosophical interpretation of values commonly associated with *ubuntu* can entail and plausibly explain this document's construal of human rights. In short, I aim to make good on the assertion made by the South African Constitutional Court that *ubuntu* is the 'underlying motif of the Bill of Rights'[6] and on similar claims made by some of the Court's members.[7]

Note that this is a work of jurisprudence, and specifically of normative philosophy, and hence that I do not engage in related but distinct projects that some readers might expect.[8] For one, I am not out to describe the way of life of any particular Southern African people. Of course, to make the label *ubuntu* appropriate for the moral theory I construct, it should be informed by pre-colonial Southern African beliefs and practices (since reference to them is part of the sense of the word

4 See several expressions of scepticism about the contemporary relevance of traditional African ideas recounted in J Lassiter 'African culture and personality' (2000) 3 *African Studies Quarterly* 10-11.

5 Constitution of the Republic of South Africa, 1996, http://www.info.gov.za/ documents/constitution/1996/index.htm (accessed 31 October 2011).

6 *Port Elizabeth Municipality v Various Occupiers* (2004) ZACC 7; 2005 1 SA 217 (CC); 2004 12 BCLR 1268 (CC) para 37.

7 In particular, see Justice Albie Sachs's remarks in *Dikoko v Mokhatla* (2006) ZACC 10; 2006 6 SA 235 (CC); 2007 1 BCLR 1 (CC) para 113, as well as views ascribed to Justice Yvonne Mokgoro in D Cornell '*Ubuntu*, pluralism and the responsibility of legal academics to the new South Africa' (2008) 20 *Law and Critique* 47 56.

8 I might also fail to adhere to certain stylistic conventions to which academic lawyers are accustomed, and beg for leniency from my colleagues.

as used by people in my and the reader's linguistic community). However, aiming to *create* an applicable ideal that has a Southern African pedigree and grounds human rights, my ultimate goal in this article is distinct from the empirical project of trying to accurately *reflect* what a given traditional black people believed about morality – something an anthropologist would do. For another, I do not here engage in legal analysis, even though I do address some texts prominent in South African legal discourse. My goal is not to provide an interpretation of case law, but rather to provide a moral theory that a jurist could use to interpret case law, among other things.

I begin by summarising the *ubuntu*-based moral theory that I have developed elsewhere (section 2) and then I articulate its companion conception of human dignity (section 3). Next, I invoke this conception of human dignity to account for the nature and value of human rights of the sort characteristic of the second chapter of South Africa's Constitution (section 4). In the following section, I apply the moral theory to some human rights controversies presently facing South Africa (and other countries as well), specifically those regarding suitable approaches to dealing with compensation for land claims, the way that political power should be distributed, and sound policies governing the use of deadly force by the police (section 5). My aim is not to present conclusive ways to resolve these contentious disputes, but rather to illustrate how the main objections to grounding a public morality on *ubuntu*, regarding vagueness, collectivism and anachronism, have been rebutted, something I highlight in the conclusion (section 6).

2 *Ubuntu* as a moral theory

Neville Alexander recently remarked that he is glad that the oral culture of indigenous Southern African societies has made it difficult to ascertain exactly how they understood *ubuntu*.[9] For him and some other intellectuals,[10] the relevant question is less 'How was *ubuntu* understood in the past?' and more 'How should we understand *ubuntu* now?' I agree with something like this perspective, and begin by spelling out what it means to pose the latter question, after which I begin to answer it.

2.1 Considerations of method

To speak legitimately of *ubuntu* at all requires discussing ideas that are at least *continuous* with the moral beliefs and practices of those who speak Nguni languages, from which the term originated, as well as

9 Comments made at a Symposium on a New Humanism held at the Stellenbosch Institute for Advanced Study (STIAS) 24-25 February 2010.

10 Eg MO Eze *Intellectual history in contemporary South Africa* (2010).

of those who have lived near and with them, such as Sotho-Tswana and Shona speakers.[11] Some would say that it is fair to call something *ubuntu* only if it mirrors, without distortion, how such peoples have traditionally understood it.[12] However, I reject such a view, for two reasons. First, analogies with other terms indicate that it can be appropriate to call a perspective *ubuntu* if it is grounded in ideas and habits that were salient in pre-colonial Southern Africa, even if it does not fully reproduce all of them. Consider, for example, the way contemporary South African lawyers use the phrase 'Roman Dutch law'. Second, there is no single way in which pre-colonial Southern African peoples understood *ubuntu*; there have been a variety of different Nguni (and related) languages and cultures and, with them, different values. One unavoidably must choose which interpretation of *ubuntu* one thinks is most apt, given one's aims.

I submit that it is up to those living in contemporary Southern Africa to refashion the interpretation of *ubuntu* so that its characteristic elements are construed in light of our best current understandings of what is morally right. Such refashioning is a project that can be assisted by appealing to some of the techniques of analytic philosophy, which include the construction and evaluation of a moral theory. A moral theory is roughly a principle purporting to indicate, by appeal to as few properties as possible, what all right actions have in common as distinct from wrong ones. What (if anything) do characteristically immoral acts such as lying, abusing, insulting, raping, kidnapping and breaking promises have in common by virtue of which they are wrong?

Standard answers to this question in Western philosophy include the moral theories that such actions are wrong just insofar as they tend to reduce people's quality of life (utilitarianism), and solely to the extent that they degrade people's capacity for autonomy (Kantianism). How should someone answer this question if she finds the Southern African values associated with talk of *ubuntu* attractive?

2.2 Moral-theoretic interpretation of *ubuntu*

She would likely start by appealing to the ubiquitous maxim 'A person is a person through other persons'.[13] When Nguni speakers state

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11 Sometimes the word *ubuntu* is meant to capture not merely Southern African moral views, but sub-Saharan ones more generally. I lack the space in this article to compare the two bodies of thought, but elsewhere I have drawn on anthropological and sociological findings indicating that there are many important similarities between a wide array of traditional cultures below the Sahara desert. If so, then Mbeki's suggestion that *ubuntu* is unique to South Africans is incorrect. See T Metz 'Toward an African moral theory' (2007) 15 *Journal of Political Philosophy* 321.

12 An assumption present in M Ramose *African philosophy through* ubuntu (1999).

13 The following several paragraphs draw on T Metz 'Human dignity, capital punishment, and an African moral theory' (2010) 9 *Journal of Human Rights* 83-85; T Metz & J Gaie 'The African ethic of *ubuntu/botho*' (2010) 39 *Journal of Moral Education* 274-276.

'*Umuntu ngumuntu ngabantu*', and when Sotho-Tswana speakers say '*Motho ke motho ka batho babang*', they are not merely making an empirical claim that our survival or well-being are causally dependent on others, which is about all a plain reading in English would admit. They are rather in the first instance tersely capturing a normative account of what we ought to most value in life. Personhood, self-hood and humanness in characteristic Southern African language and thought are value-laden concepts. That is, one can be more or less of a person, self or human being, where the more one is, the better.[14] One's ultimate goal in life should be to become a (complete) person, a (true) self or a (genuine) human being.

So, the assertion that 'a person is a person' is a call to develop one's (moral) personhood, a prescription to acquire *ubuntu* or *botho*, to exhibit humanness. As Desmond Tutu remarks: 'When we want to give high praise to someone, we say *Yu u nobuntu*; Hey, so-and-so has *ubuntu*.'[15] The claim that one can obtain *ubuntu* 'through other persons' means, to be more explicit, by way of communal relationships with others.[16] As Shutte, one of the first professional South African philosophers to publish a book on *ubuntu*, sums up the basics of the ethic:[17]

> Our deepest moral obligation is to become more fully human. And this means entering more and more deeply into community with others. So although the goal is personal fulfilment, selfishness is excluded.

Just as 'an unjust law is no law at all' (Augustine), Southern Africans would say of a person who does not relate communally that 'he is not a person'. Indeed, those without much *ubuntu*, roughly, those who exhibit discordant or indifferent behaviour with regard to others, are often labelled 'animals'.[18]

One way that I have sought to contribute to *ubuntu* scholarship is by being fairly precise, not only about what communal relationships and related concepts such as harmony essentially involve, but also

14 As is made particularly clear in Ramose (n 12 above) 51-52. For similar ideas ascribed to sub-Saharan thought generally, see K Wiredu 'The African concept of personhood' in HE Flack & EE Pellegrino (eds) *African-American perspectives on biomedical ethics* (1992) 104; I Menkiti 'On the normative conception of a person' in K Wiredu (ed) *A companion to African philosophy* (2004) 324.

15 D Tutu *No future without forgiveness* (1999) 31.

16 For representative statements from those in Southern Africa, see S Biko 'Some African cultural concepts' in S Biko *I write what I like. Selected writings by Steve Biko* (1971/2004) 46; Tutu (n 15 above) 35; N Mkhize '*Ubuntu* and harmony' in R Nicolson (ed) *Persons in community* (2008) 38-41.

17 A Shutte *Ubuntu: An ethic for the new South Africa* (2001) 30.

18 C Pearce '*Tsika*, *Hunhu* and the moral education of primary school children' (1990) 17 *Zambezia* 147; MJ Bhengu *Ubuntu: The essence of democracy* (1996) 27; M Letseka 'African philosophy and educational discourse' in P Higgs *et al* (eds) *African voices in education* (2000) 186.

about how they figure into performing morally-right actions.[19] To seek out community with others is not best understood as equivalent to doing whatever a majority of people in society want or conforming to the norms of one's group. Instead, African moral ideas are both more attractively and more accurately interpreted as conceiving of communal relationships as an objectively-desirable kind of interaction that should instead guide what majorities want and which norms become dominant.

More specifically, there are two recurrent themes in typical African discussion of the nature of community as an ideal, what I call 'identity' and 'solidarity'. To identify with each other is largely for people to think of themselves as members of the same group, that is, to conceive of themselves as a 'we', for them to take pride or feel shame in the group's activities, as well as for them to engage in joint projects, co-ordinating their behaviour to realise shared ends. For people to fail to identify with each other could go beyond mere alienation and involve outright division between them, that is, people not only thinking of themselves as an 'I' in opposition to a 'you', but also aiming to undermine one another's ends.

To exhibit solidarity is for people to engage in mutual aid, to act in ways that are reasonably expected to benefit each other. Solidarity is also a matter of people's attitudes such as emotions and motives being positively oriented toward others, say, by sympathising with them and helping them for their sake. For people to fail to exhibit solidarity would be for them either to be uninterested in each other's flourishing or, worse, to exhibit ill-will in the form of hostility and cruelty.

Identity and solidarity are conceptually separable, meaning that one could in principle exhibit one sort of relationship without the other. For instance, workers and management in a capitalist firm probably identify with one another, but insofar as typical workers neither labour for the sake of managers nor are sympathetic toward them, solidarity between them is lacking. Conversely, one could exhibit solidarity without identity, say, by helping someone anonymously.

While identity and solidarity are logically distinct, characteristic African thought includes the view that, morally, they ought to be realised together. That is, communal relationship with others, of the sort that confers *ubuntu* on one, is well construed as the combination of identity and solidarity. One will find implicit reference to both facets of community in the following statements by Southern African adherents to *ubuntu*:[20] 'Harmony is achieved through close and sympathetic

19 Metz (nn 11 & 13 above).

20 For similar expressions from Africans far north of the Limpopo, see S Gbadegesin *African philosophy* (1991) 65; K Gyekye *Beyond cultures* (2004) 16; P Iroegbu 'Beginning, purpose and end of life' in P Iroegbu & A Echekwube (eds) *Kpim of morality ethics: General, special and professional* (2005) 442.

social relations within the group;'[21] '[*U*]*buntu* advocates ... express commitment to the good of the community in which their identities were formed, and a need to experience their lives as bound up in that of their community;'[22] 'Individuals consider themselves integral parts of the whole community. A person is socialised to think of himself, or herself, as inextricably bound to others ... *Ubuntu* ethics can be termed anti-egoistic as it discourages people from seeking their own good without regard for, or to the detriment of, others and the community. *Ubuntu* promotes the spirit that one should live for others.'[23]

To begin to see the philosophical appeal of grounding ethics on such a conception of community, consider that identifying with others can be cashed out in terms of sharing a way of life and that exhibiting solidarity toward others is naturally understood in terms of caring about their quality of life. And the union of sharing a way of life and caring about others' quality of life is basically what English speakers mean by a broad sense of 'friendship' (or even 'love'). Hence, one major strand of Southern African culture places friendly (or loving) relationships at the heart of morality, as others have tersely summarised *ubuntu* on occasion. For instance, speaking of African perspectives on ethics, Tutu remarks:[24]

> Harmony, friendliness, community are great goods. Social harmony is for us the *summum bonum* – the greatest good. Anything that subverts or undermines this sought-after good is to be avoided like the plague.

Kasenene similarly says that 'in African societies, immorality is the word or deed which undermines fellowship'.[25]

Tutu and Kasenene indicate that one must, above all, avoid unfriendliness or acting in ways that would threaten communal ties. However, a fuller statement of how to orient oneself toward friendly relationships is needed, for example, in light of the question of what to do when being unfriendly in a certain respect is expected to have the long-term effect of promoting a greater friendliness.

My suggestion about how to orient oneself toward friendly or communal relationships, in order to act rightly and exhibit *ubuntu*, is that one ought to *prize* or *honour* such relationships. Such a relation to them contrasts in the first instance with promoting them as much as possible wherever one can.[26] The latter prescription, simply to maximally produce communal relationships (of identity and solidarity) and reduce

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21 Mokgoro (n 2 above) 3.

22 Nkondo (n 3 above) 91.

23 M Munyaka & M Motlhabi '*Ubuntu* and its socio-moral significance' in FM Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 69 71-72.

24 Tutu (n 15 above) 35.

25 P Kasenene *Religious ethics in Africa* (1998) 21.

26 For an analysis of these two different ways of responding to value, see P Pettit 'Consequentialism and respect for persons' (1989) 100 *Ethics* 116; D McNaughton & P Rawling 'Honouring and promoting values' (1992) 102 *Ethics* 835.

anti-social ones (of division and ill-will) would permit intuitively impermissible behaviour. To adopt an example familiar to a philosophical audience, an instruction to promote as many communal relationships as one can in the long run would permit a doctor to kill an innocent, relatively healthy individual and distribute her harvested organs to three others who would otherwise die without them, supposing there would indeed be more of such relationships realised in the long term. A moral theory that focuses *exclusively* on promoting good outcomes however one can (which is 'teleological') has notorious difficulty in accounting for an individual right to life, among other human rights.

I therefore set it aside in favour of an ethical approach according to which certain ways of treating individuals are considered wrong at least to *some* degree 'in themselves', apart from the results. Honouring communal relationships would involve, roughly, being as friendly as one can oneself and doing what one can to foster friendliness in others without one using a very unfriendly means.[27] This kind of approach, which implies that certain ways of bringing about good outcomes are impermissible (and is 'deontological'), most promises to ground human rights.

To sum up, the maxim 'A person is a person through other persons', which is fairly opaque (at least to English speakers), admits of the following, more revealing interpretations: 'One becomes a moral person insofar as one honours communal relationships', or 'A human being lives a genuinely human way of life to the extent that she prizes identity and solidarity with other human beings', or 'An individual realises her true self by respecting the value of friendship'. According to this moral theory, grounded in a salient Southern African valuation of community, actions are wrong not merely insofar as they harm people (utilitarianism) or degrade an individual's autonomy (Kantianism), but rather just to the extent that they are *unfriendly* or, more carefully, fail to respect friendship or the capacity for it. Actions such as deception, coercion and exploitation fail to honour communal relationships in that the actor is distancing himself from the person acted upon, instead of enjoying a sense of togetherness; the actor is subordinating the other, as opposed to co-ordinating behaviour with her; the actor is failing to act for the good of the other, but rather for his own or someone else's interest; or the actor lacks positive attitudes toward the other's good, and is instead unconcerned or malevolent.

From the analysis so far, it should be clear that the moral-theoretic interpretation of *ubuntu* is much more precise than other, more typical renditions of it. In the rest of this article, I aim to demonstrate how this *ubuntu*-based moral theory plausibly accounts for the human rights characteristic of the South African Constitution and can enable us to

27 I refine this approximate principle below.

address contemporary controversies about justice in South Africa and elsewhere.

Before applying the theory, though, I remind the reader not to conflate it (a philosophical account of what all right actions have in common) with an anthropological description of the world views of any particular sub-Saharan peoples. I am providing one, theoretically attractive way to interpret ideas commonly associated with *ubuntu*; I am neither suggesting that it is the only way to do so, nor trying to spell out a principle that anyone has actually held prior to now. I do, however, believe that the suggested interpretation of *ubuntu* is a promising way to unify into the form of a theory a wide array of beliefs and practices that have been recurrent for a long span of time and a large number of peoples south of the Sahara.[28]

3 *Ubuntu* as a moral theory and human dignity

In order to explain how *ubuntu* as a moral theory can account for much of the Bill of Rights, I make the presumption that human rights are grounded upon human dignity. In this section, I first motivate this assumption, and then articulate a new conception of human dignity grounded in *ubuntu* as a moral theory, which I will use in the rest of the article to explain and unify human rights.

3.1 Human rights and human dignity

One has a human right to something, by definition, insofar as all agents have a stringent duty to treat one[29] in a certain way that obtains because of some quality one shares with (nearly) all other human beings and that must be fulfilled, even if not doing so would result in marginal gains in intrinsic value or in somewhat fewer violations of this same duty in the long run. So construed, a human right is a moral right against others, that is, a natural duty that ought to be taken into account by morally responsible decision makers, regardless of whether they recognise that they ought to. I am therefore not interested in norms that are *inherently* either customarily acknowledged or legally enforced (even though I do use the second chapter of the South African Constitution to illustrate characteristic human rights).

There are utilitarians who claim that human rights are basically rules of thumb designed to maximise the general welfare, but I, with the majority of contemporary moral theorists, presume that such a view has been shown to be implausible,[30] in part because of examples such

28 Which I have argued in Metz (n 11 above).

29 I do not address group rights in this article, deeming 'human rights' to pick out the entitlements of individuals.

30 See, eg, R Nozick *Anarchy, state, and utopia* (1974) 28-34.

as the organs case above. Instead, I assume that to observe human rights is to treat an individual as having a dignity, roughly, as exhibiting a superlative non-instrumental value. Alternatively, a human rights violation is a failure to honour people's special nature, often by treating them merely as a means to some ideology such as racial or religious purity or to some prudentially selfish end.

Using this framework, one would distinguish the violation of a right from a justifiable limitation thereof, roughly in terms of the reason for which the right has not been observed. It would degrade human dignity, and hence violate a right, to lock up an innocent person in a room in order to obtain a ransom, but it might not degrade human dignity, and hence might justifiably limit a right, to lock an innocent person in a room in order to protect others from a virulent disease he is carrying. Kidnapping and quarantining can involve the same actions, but since the purposes for which the actions are done differ, there is a difference with regard to whether dignity is disrespected and a right is violated, on the one hand, or whether dignity is respected and a right is justifiably limited, on the other.

This theoretical framework, in which human dignity is the foundational value of human rights, has become the dominant view among moral philosophers, jurisprudential scholars, United Nations theorists, and the German and South African Constitutional Courts.[31] However, they have tended to apply this general perspective in a particular way, namely, by cashing out the content of dignity in terms of *autonomy*. The dominant theme has been that human rights are ultimately ways of treating our intrinsically valuable capacity for self-governance with respect.[32] Enslaving others in order to benefit oneself, discriminating for the purpose of purifying the race, torturing in order to deter political challenges and the like seem to be well conceived, on the face of it, as degradations of individuals' ability to govern themselves, to make free and informed decisions regarding the fundamental aspects of their lives.

I lack the space here to argue against, or even to explore, this powerful and influential model, initially articulated with most care by the German enlightenment philosopher, Immanuel Kant.[33] Instead, I mention the Kantian theory in order to motivate the idea that what probably

31 For a discussion of the role of dignity in South African jurisprudence, see S Woolman 'Dignity' in S Woolman (ed) *Constitutional law of South Africa* (2002) 36; A Chaskalson 'Dignity and justice for all' (2009) 24 *Maryland Journal of International Law* 24; L Ackermann *Human dignity: Lodestar for equality in South Africa* (unpublished manuscript).

32 For a discussion in the South African context, see D Jordaan 'Autonomy as an element of human dignity in South African case law' (2008) 8 *The Journal of Philosophy, Science and Law* http://www6.miami.edu/ethics/jpsl/archives/all/Autonomy-human-dignity.html (accessed 31 October 2011); Woolman (n 31 above).

33 I Kant *Groundwork of the metaphysics of morals* (1785), I Kant *Metaphysics of morals* (1797).

theoretically unifies the myriad human rights that intuitively exist is an intrinsic worth of the human person that admits of no equivalent among other beings on the planet. My present task is to articulate a Southern African view that can plausibly rival the Kantian conception by virtue of which we have a dignity and hence are bearers of human rights.

3.2 Human dignity in existent Southern African thought

Writings by those sympathetic to Southern African world views include two salient conceptions of human dignity, but, as they stand, neither is particularly useful for the aim of accounting for human rights. One view of dignity analyses it in terms of something variable among human beings that is a function of their degree of *ubuntu*. The idea is that the more one lives a genuinely human – and hence communal – way of life, the more one has a dignified existence. Traditionally speaking, it would be elders, and especially ancestors, who have the greatest dignity, so conceived. This view might be what Botman has in mind when he says that '[t]he dignity of human beings emanates from the network of relationships, from being in community; in an African view, it cannot be reduced to a unique, competitive and free personal ego'.[34]

Such a variant conception of dignity obviously cannot ground human rights, which are uncontroversially deemed to be equal among persons. If a merely decent person, let alone a scoundrel, has a right to life to no less a degree than a Nelson Mandela or Mother Teresa (at least in their stereotypical construals), then we need a conception of dignity that does not vary according to degrees of moral merit. Another way to see the problem is this: A non-violent person who has been put into solitary confinement and hence lacks communal relationships with others nonetheless retains dignity, indeed a dignity that is degraded by virtue of the solitary confinement. If dignity were a function of actually being in community, however, then this individual would counterintuitively lack a dignity.

Now, one does find an invariant conception of dignity among Southern African thinkers, according to which what makes us deserving of equal respect is the fact of human life as such.[35] The traditional thought is that every human being has a spiritual self or invisible 'life force' that has been bestowed by God, that can outlive the death of her body, and that makes her more special than anything else in the mineral, veg-

34 HR Botman 'The OIKOS in a global economic era' in JR Cochrane & B Klein (eds) *Sameness and difference: Problems and potentials in South African civil society* (2000) http://www.crvp.org/book/Series02/II-6/chapter_x.htm (accessed 31 October 2011).

35 See, eg, Justice Mokgoro's remarks in the South African Constitutional Court case *State v Makwanyane & Mchunu* (1995) ZACC 3; 1995 6 BCLR 665; 1995 3 SA 391 paras 309-311; Ramose (n 12 above) 138-145; MJ Bhengu *Ubuntu: Global philosophy for humankind* (2006) 29-87.

etable or animal kingdoms. Such a view would obviously underwrite an equal right to life, and also probably rights to integrity of the human organism that carries the 'soul'.

However, for several reasons I do not find this conception of human dignity attractive. First, grounding dignity in human life *qua* spiritual does a poor job of accounting for human rights that do not concern 'life and death matters', for example, to democratic participation in government or to freedom of movement.[36] Second, a more secular understanding of human dignity is more apt for modern, and often multicultural, societies than is a highly contested, particular form of supernaturalism. Third, I seek an interpretation of human dignity that coheres particularly well with the moral theory articulated above, which makes no fundamental reference to God, a soul or similarly supra-physical beings or forces.

3.3 A more promising conception of dignity

In any event, I draw upon alternative resources in Southern African moral thought to construct a conception of human dignity that entails and plausibly explains human rights. Here is my suggestion: One is to develop one's humanness by communing with those who have a dignity in virtue of their capacity for communing. That is, individuals have a dignity insofar as they have a communal nature, that is, the inherent capacity to exhibit identity and solidarity with others. According to this perspective, what makes a human being worth more than other beings on the planet is roughly that she has the essential *ability* to love others in ways these beings cannot. If you had to choose between running over a cat or a fellow person, you should run over the cat, intuitively because the person is worth more. While the Kantian theory is the view that persons have a superlative worth because they have the capacity for autonomy, the present, *ubuntu*-inspired account is that they do because they have the capacity to relate to others in a communal way.

Note that some people will have *used* their capacity for communal relationship to a greater degree than others. However, it is not the exercise of the capacity that matters for dignity, but rather the capacity itself. Even those who have misused their capacity for community, by acting immorally, retain the capacity to act otherwise and hence have not thereby lost their dignity.

Now, some people do have a *greater ability* to enter into community with others, but the present conception of dignity is that supposing one has the ability above a certain threshold, one has a dignity that is the equal of anyone else who also meets it.[37] Whenever one encounters an individual with the requisite degree of the capacity for sharing

36 I argue the point in T Metz 'African conceptions of human dignity: Vitality and community as the ground of human rights' (2011) 13 *Human Rights Review* 1.

37 See J Rawls *A theory of justice* (1971) 505-506.

a way of life and caring for others' quality of life, one must treat that capacity of hers with equal respect.

Although the differential use of the capacity for communal relationships, and even a differential degree of the capacity itself, are compatible with equal dignity and equal respect, there is a very small percentage of human beings who utterly lack this capacity, and hence lack a dignity by the present account. Here, one should keep in mind that literally every non-arbitrary and non-speciesist theory of what constitutes human dignity faces the problem that some human beings lack the relevant property. Unless we have a dignity merely by virtue of our DNA, it will follow from any theory that anencephalic infants, for example, lack human dignity, meaning that the present view is no worse off than, say, the Kantian one. Furthermore, from the bare fact that there are probably some human beings that lack a dignity, it does not follow that one may treat them however one pleases; for they in all likelihood have a moral status for reasons other than dignity, that is, their capacity to feel pain (or, as I argue elsewhere, their ability to be an object of others' love, even in the absence of their ability to exhibit love themselves).[38]

4 An *ubuntu*-based conception of dignity as the basis of human rights

In this section I put the *ubuntu*-inspired account of dignity from the previous section to work, aiming to demonstrate the way that it naturally grounds salient human rights. I start by articulating a principle about how to respond to beings with such a dignity that purports to capture most human rights violations, and then I apply the principle to much of the Bill of Rights from the second chapter of South Africa's Constitution.

4.1 From human dignity to human rights

My proposal is that we understand human rights violations to be serious degradations of people's capacity for friendliness, understood as the ability to share a way of life and care for others' quality of life, where such degradation is often a matter of exhibiting *extraordinarily unfriendly behaviour* toward them. Human rights violations are ways of gravely disrespecting people's capacity for communal relationship, conceived as identity and solidarity, which disrespect principally takes the form of a significant degree of anti-social behaviour, for example, of

38 For an *ubuntu*-based discussion of the moral standing of beings who in principle cannot exhibit identity and solidarity, see T Metz 'An African theory of moral status: A relational alternative to individualism and holism' (2011) 14 *Ethical Theory and Moral Practice* http://www.springerlink.com/content/j5g38kl117110628/fulltext.pdf (accessed 31 October 2011).

division and ill-will. As I demonstrate below, many of the most important human rights, for instance not to be enslaved or tortured, are well understood as protections against enmity, against an agent treating others as separate and inferior, undermining their ends, seeking to make them worse off, and exhibiting negative attitudes toward them such as power seeking and *Schadenfreude*.

This explanation of the nature of a human rights violation is a promising start, but is incomplete; as it stands, it requires pacifism and forbids any form of unfriendly behaviour such as coercion. Yet, almost no believers in human rights are pacifists, instead maintaining that, in some situations, violence is justified, at least for the sake of preventing violence. Indeed, one of the most uncontroversial human rights that people have is a claim against their state to use force if necessary to protect them from attack on the part of domestic criminals or foreign invaders.

I therefore must find a way to account for the impermissibility of unfriendliness when there are intuitive human rights violations, and the permissibility of unfriendliness when there are not. In light of the reflections above about the difference between a kidnap and a quarantine, it is natural to suggest that the difference will importantly depend on the purpose served by the unfriendliness. Consider, then, this principle: It is degrading of a person's capacity for friendliness, and hence a violation of her human rights, to treat her in a substantially unfriendly way if one is not seeking to counteract a proportionate unfriendliness on her part, but it need not be degrading of a person's capacity for friendliness to treat her in a substantially unfriendly way, when one's doing so is necessary to prevent or correct for a comparable unfriendliness on her part. A kidnap is a human rights violation because the person kidnapped is innocent, namely, roughly, has not acted in an unfriendly way, but a quarantine need not be a human rights violation, if the person quarantined refuses of her own accord to isolate herself so as to avoid infecting others with an incurable, fatal, easily communicable disease.

In short, being unfriendly toward another is not necessarily to degrade her capacity for friendship, as respecting her capacity requires basing one's interaction with her on the way she has exercised it.[39] To respect those who have not been unfriendly requires treating them in a friendly way, while respecting those who have been unfriendly permits treating them in an unfriendly way, under conditions in which doing so is necessary to protect the victims of their comparable unfriendliness. If someone misuses her capacity for communal relationship, there is no disrespect of this capacity and human rights violation if divisiveness and ill-will is directed toward her as essential to counteract her own

39 In order to justify coercion, a parallel principle is widely used by Kantians, who prize the capacity for freedom.

divisiveness and ill-will. Hence, violence is justified when, and only when, necessary to protect innocent victims of unjustified violence.

Note that this rationale is not retributive in the sense of justifying the imposition of suffering merely because it is deserved or of treating aggressors as beyond the pale of human community. The principle implies that it would be unjust to treat someone who has been unfriendly in an unfriendly way, if doing were *not* necessary to protect her potential victims or to compensate her actual ones. The principle therefore permits punishment, deadly force and other forms of coercion as they intuitively can be justified, while also underwriting the prescription not to use it when harm can be prevented or alleviated without it. Hence, this principle can make theoretical sense of the tight associations often drawn between *ubuntu* and restorative justice,[40] on the one hand, *and* between *ubuntu* and self-defence,[41] on the other: Intentional harm may be inflicted on offenders only when necessary to protect their victims, which, in many cases, it is not.

Summing up, according to the moral-theoretic interpretation of *ubuntu*, one is required to develop one's humanness by honouring friendly relationships (of identity and solidarity) with others who have dignity by virtue of their inherent capacity to engage in such relationships, and human rights violations are serious degradations of this capacity, often taking the form of very unfriendly behaviour that is not a proportionate, counteractive response to another's unfriendliness. This *ubuntu*-inspired theory is sufficient to account for a wide array of human rights, as I now sketch in the context of South Africa's Bill of Rights. I obviously lack the space to apply it to every single right included there, and so refer to a few major clusters of them only. In addition, in striving to give the reader a bird's eye view of how one might try to unify human rights by appeal to the dignity of our communal nature (rather than our autonomy), I inevitably pass over many important subtleties; issues of justifiable limitation, progressive realisation, horizontal application and the like will have to wait for another, much lengthier treatment.

4.2 Human rights to liberties

The South African Constitution counts as 'liberal' at least insofar as it explicitly recognises individual rights to freedoms of religion, belief, press, artistic creativity, movement and residence.[42] The state and all

40 Eg Tutu (n 15 above); D Louw 'The African concept of *ubuntu* and restorative justice' in D Sullivan & L Tifft (eds) *Handbook of restorative justice* (2006) 161; A Krog '"This thing called reconciliation ..."; Forgiveness as part of an interconnectedness-towards-wholeness' (2008) 27 *South African Journal of Philosophy* 353.

41 Ramose (n 12 above) 120: 'The authority of law rests in the first place upon its recognition of self-defence as an inalienable individual or collective right ... This is the basis of *ubuntu* constitutional law.' See also Kasenene (n 25 above) 41.

42 Secs 11-18 & 21-22 South African Constitution.

other agents in society are forbidden from restricting what innocent people may do with their minds and bodies for the sake of any ideology or benefit; only some other, stronger right can outweigh these 'negative' rights to be free from interference.

Respect for the dignity of persons as individuals with the capacity for friendly relationships *qua* identity and solidarity accounts naturally for rights to liberty. What genocide, torture, slavery, systematic rape, human trafficking and apartheid have in common, by the present theory, is that they are instances of substantial division and ill-will directed to those who have not acted this way themselves, thereby denigrating their special capacity to exhibit the opposite traits of identity and solidarity. Concretely, one who engages in such practices treats people, who have not themselves been unfriendly, in an extremely unfriendly way: The actor treats others as separate and inferior, instead of enjoying a sense of togetherness; the actor undermines others' ends, as opposed to engaging in joint projects with them; the actor harms others (which includes stunting their potential to flourish as loving beings) for his own sake or for an ideology, as opposed to engaging in mutual aid; and the actor evinces negative attitudes toward others' good, rather than acting consequent to a sympathetic reaction to it.

Of most relevance in the context of these rights not to be enslaved, tortured and otherwise interfered with is the capacity to identify with others or to share a way of life, where *genuinely sharing* a way of life requires interaction that is co-ordinated, rather than subordinated. Part of what is valuable about friendship or communal relationships is that people come together, and stay together, of their own accord. When one's body is completely controlled by others, when one is forbidden from thinking or expressing certain ideas, or when one is required by law to live in some parts of a state's territory rather than others, then one's ability to decide for oneself with whom to commune and how is impaired. In order to treat a person as though her capacity to share a life with others is (in part) the most important value in the world, it ought not be severely restricted (unless doing so is necessary to rebut similar restrictions that she is imposing on others).

4.3 Human rights to criminal justice

Although innocent people have human rights to liberty, they also have human rights to protection from the state, which can require restrictions on the liberty of those reasonably suspected of being guilty. The South African Constitution recognises an obligation on the part of the state to set up a police force that is tasked with preventing crime and enforcing the law.[43] The judgment that offenders do not have human rights never to be punished, or that violent aggressors do not have human rights never to be the targets of (perhaps, deadly) force,

43 Sec 205(3) South African Constitution.

is well explained by the principle that it does not degrade another's capacity for friendliness if one is unfriendly toward him as necessary to counteract his own proportionate unfriendliness. In addition, the judgment that innocents have human rights against the state to use force against the guilty as necessary to protect them is well explained by the principle that it would degrade the innocents' capacity for friendliness, would fail to treat it as the most important value in the world, if the state did not take steps, within its power, to effectively protect it from degrading treatment by others.

Moving away from an explanation of the human rights of the innocent to protection from the state, consider now the rights of those suspected of guilt. Everyone in South Africa who has been charged with a crime is deemed to have rights to be informed of the charge, to be able to prepare a defence, to be tried by an impartial body, to have the trial conducted in a language he understands, to be released from pre-trial detention when feasible, and to remain in touch with family and counsel.[44]

These and similar rights are, in large part, a function of the need to avoid punishing or otherwise harming the innocent (even if doing so likely results in the acquittal of a greater number of guilty). Supposing the state wanted to minimise the extent to which those innocent of any offence were inadvertently convicted or made worse off, it would adopt these kinds of rights. And respect for people's capacity for community well explains an urgent concern to avoid coercing the innocent. As mentioned above, respect for this capacity means treating a person in accordance with the way she has exercised it. Roughly, those who have been friendly do not warrant unfriendly treatment such as detention and punishment, whereas those who have been unfriendly do warrant unfriendly treatment, when necessary to protect or compensate those threatened by their own unfriendliness. The state must take care, therefore, to discriminate between the two groups.

4.4 Human rights to political power

Rights to liberty and to criminal justice are ones that a democratic legislature must not contravene, while the present batch of rights concerns the abilities of citizens to participate in democratic legislation. The Bill of Rights accords citizens the rights to form political parties, to support a political party of their choice, to vote in regular elections, and to run for public office.[45]

One can fairly sum up these rights by saying that citizens are entitled to an equal opportunity to influence political outcomes. Now, if what is special about us is, in part, our ability to identify with others or to share a way of life, then that is going to require sharing political power.

44 Secs 12 & 34-35 South African Constitution.

45 Sec 19 South African Constitution.

And supposing we are equally special by virtue of having the requisite capacity to share a way of life, that means according people the equal ability to influence collective decision making.

One could also underwrite democratic rights by appealing, somewhat less powerfully, I think, to considerations of respect for solidarity. The state must honour communal relationships in part by acting to benefit the people it has allowed within its territory, and it can best do so if they are accorded the final authority to determine political choice. Dictators are rarely disposed to be benevolent, and even when their intentions are good, they lack the knowledge and skills to do what is in fact likely to enable their subjects to live better lives. In contrast, as John Stuart Mill argued long ago, when residents are given the responsibility for governing themselves, then not only is the government more likely to be responsive to their interests, but they also tend to become more active and self-reliant.[46] Given the plausible assumption that the more passive and dependent one is, the less well-off one is likely to be, a principle of respect for people's capacity for (among other things) mutual aid gives reason to recognise human rights to participate in governance.

4.5 Human rights to socio-economic goods

South Africa's Constitution is famously considered progressive for explicitly entitling (at least) legal residents to a wide array of means. Specifically, people have rights against the state (and, in principle, other agents in society) to resources such as housing, healthcare, food, water, social security and education.[47]

There are two paths running from the principle of respect for our communal nature to the judgment that we have 'positive' human rights to socio-economic assistance. First, for the state to honour communal relationships, it must seek to establish them between it and its legal residents. And that will of course mean, with regard to solidarity, that the state must do what it can to improve their quality of life, and to do so for their sake consequent to a sympathetic understanding of their situation. Furthermore, with respect to identity, residents are unlikely to enjoy a sense of togetherness with politicians and state bureaucrats if the latter are not going out of their way to fight poverty.

Second, another part of the state respecting its residents' dignity as people capable of community will mean doing what it can to foster community among residents themselves. Consider the identity facet, first. It is hard to enjoy a sense of togetherness with others in society when one is seriously impoverished. One feels a sense of shame, inferiority or at least distance when one's basic needs are not met while substantial segments of one's society enjoy great wealth. In addition, one's ability to engage in joint projects with others is not honoured if

46 JS Mill *Considerations on representative government* (1861).

47 Secs 26-27 & 29 South African Constitution.

one is lacking means. Respect for this ability to co-operate with others means developing and supporting it by providing money and other goods needed to facilitate common projects.

Finally, think about the way solidarity between residents is affected by the fulfilment or disregard for their socio-economic rights. Treating others as though they are capable of relationships of mutual aid means, in part, providing them with the resources that would enable them to commune with others. I attended a South African National Heritage Council *imbizo* that was devoted to *ubuntu*, where an elderly black woman said that, for her, the problem with her being poor is that she is not able to help others, that is, to give wealth away.

Of course, there are more rights than these adumbrated in the Constitution, but discussing of all them is unnecessary in order to provide a sense of what is involved in the claim that people have a human dignity by virtue of their capacity for friendly or communal relationships *qua* identity and solidarity and of how various human rights plausibly follow from a requirement to respect dignity so conceived. The analyses did not appeal to the Kantian notion of autonomy; the invocation of our communal nature did the work, and appears to be worth taking seriously as a rival to the more dominant, more individualist approach to dignity and rights.

5 Addressing contemporary human rights controversies

In the previous section I argued that the *ubuntu*-based conception of dignity naturally underwrites a large number of human rights that we intuitively have and that appear in the South African Constitution. In this section, I apply this conception of dignity to a few issues that are more controversial or at least are much less taken for granted in contemporary South Africa and elsewhere on the continent. Contested topics include how to effect compensatory justice with regard to land, how to make political decisions, and how to use deadly force when apprehending suspects. Note that my aim is not to present resolutions of these problems, but rather to indicate respects in which the present moral-theoretic interpretation of *ubuntu* can shed light on them.

5.1 For a more reconciliatory land reform

As is well known, at the end of apartheid in 1994, nearly 90 per cent of land in South Africa had been forcibly expropriated into the hands of white people who constituted about 10 per cent of the population, and the new Constitution makes provision to compensate those who have been dispossessed by way of land reform (or comparable redress).[48]

48 Sec 25 South African Constitution.

It is also well known that little land has been transferred back to the black majority, with the government acknowledging that it will fail to reach its 2014 goal of returning 30 per cent of white-held land. Less well known is that, according to a recent statement by the African National Congress, 90 per cent of the land that has been returned to black hands has not been productive, with the government threatening to repossess such land if its current owners do not use it to farm.[49]

In regard to these conditions, I have not infrequently encountered two antipodal responses to the land question, which responses share a common assumption that the *ubuntu*-based moral theory entails is false. I first spell out the antinomy, then bring out the dubious assumption both positions rely upon, and finally sketch a different approach.

Not surprisingly, the two competing approaches to land reform tend to correlate with race, making the issue black and white. On the white side, I sometimes hear it argued that whites owe no restitution to South African blacks since the latter's standard of living would have been worse had whites not taken control of the country. Whites sometimes point out that in the African country where they reigned the longest, the quality of life is the best. Even the worst-off in South Africa are better off, so the argument goes, than the worst-off elsewhere south of the Sahara.

On the black side, I sometimes hear Southern Africans argue that their standard of living would have been higher had whites not settled, exported all the minerals and kept the profits for themselves, and that, in any event, the right thing for black people to do, or for the state to do on their behalf, is immediately to take the land and give it back to those who originally owned it or who would have inherited it from those who did. In response to the rhetorical question of 'Do you really want another Zimbabwe?', I have sometimes heard the reply that the compensatory justice effected there has been worth the devastating costs to life expectancy and overall quality of life. The most important moral consideration, from this perspective, is restoring an original state.

I ignore the empirical claims made by the two sides, and instead demonstrate that they both share a questionable moral premise. The premise is this: The appropriate way to distribute land today is a function of what would have happened in the absence of contact between whites and blacks. Tersely, whites say that blacks have more wealth than they would have had had whites not come, and hence are not entitled to land redistribution, while blacks say that they are entitled to land redistribution because they would have had more wealth had whites not come or at least because justice requires putting things back the way they would have been had whites not come.

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49 G Nkwinti 'Minister of Rural Development and Land Reform Cluster Briefing' 2 March 2010 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=164364&sn=Detail (accessed 31 October 2011).

In light of a requirement to respect human dignity *qua* capacity for communal relationships, there are two deep problems with the shared premise that the right way to distribute land today is fixed by counterfactual claims about what would have happened without white and black interaction. One problem is that it is solely a 'backward-looking' principle, directing us to base a present distribution solely on facts about the past, and does not take into account the likely consequences of a policy, where such 'forward-looking' or future considerations are morally important. A second problem is that it is the wrong backward-looking principle to invoke.

On the latter, one cannot reasonably deny that facts about the past are *pro tanto* relevant to determining justice in the present. It is hard to doubt that if you steal my bicycle and give it to a third party, that party does not rightfully own the bicycle and has strong moral reason to give it back to me, or to my descendants to whom I would have bequeathed it.[50] However, the appropriate benchmark for ascertaining compensation is not a function of what would have happened had whites sailed on past the Cape, but rather what would have happened had whites fulfilled their moral obligations to blacks upon arriving there. To treat people as capable of the special good of communal relationship, as we have seen, includes exhibiting solidarity toward them. The relevant question, then, is this: What would the distribution of wealth have been like had whites, say, *shared* their science and technology, the profits resulting from mineral excavation and the allocation of political power? So, even if it were true that blacks would have been worse off had whites not arrived, that is not relevant to establishing what blacks are currently owed on backward-looking grounds.

However, it is a further mistake to suppose that only backward-looking considerations are relevant to determining a just distribution of land at the present time. Above I maintained that respect for people's capacity for friendliness can permit unfriendliness in response to unfriendliness, but most clearly when and only when responding in that way will prevent or make up for harm done to victims of the initial unfriendliness. In the present context, that means that an unfriendly action by the state toward whites, such as expropriation of land they currently hold, is justified only if it is likely to help those harmed by the land being held by whites, that is, dispossessed blacks. And it is unlikely that blacks can expect benefit from a Zimbabwe-style land grab.

The present suggestion does not rely on the racist notion that 'blacks cannot farm' or are more generally incapable of being productive without guidance from whites. Instead, the claim is what I take to be the reasonable one that, in order to run farms and keep the economy stable, blacks given agricultural land need substantial financing and training. Now, the present government has not been able to provide

50 See BR Boxill 'The morality of reparations' (1972) 2 *Social Theory and Practice* 113.

these well to the small number of blacks who have been given land so far, explaining the 90 per cent failure rate, and so the point is that the government would be even less able to support new farmers in a Zimbabwean condition. Hence, the state is not morally required to confiscate white-held land *en masse*, and is probably forbidden from doing so.

I am not an economist, and so cannot be detailed about the right way forward. However, based on the above moral argumentation, I can suggest some broad contours. Whites do owe blacks land, and so they, and the state that wrongfully gave the land to whites in the past, must transfer it in a way that is likely to benefit blacks. Here are two ways this could be done. The state could take a radical approach but implement it gradually, while white farmers could take a moderate approach but do so immediately. With regard to the state, it could grant only limited tenure over land, so that an individual can own it for a maximum period of, say, 75 years. Over time, then, the state would regain control over the distribution of land, granting private licences to use land in ways that balance considerations of redress and productivity. In the meantime, it would give tax breaks or low-interest loans to new black farmers, and would redistribute taxes on white farms to impoverished blacks in rural areas. With regard to white farmers, they could begin by formally apologising for retaining substantial control over land that was wrongfully taken from blacks. And they could collectively decide to impart skills to blacks and to transfer a certain percentage of fertile land to those with the demonstrable ability to make use of it. Current agricultural associations would be sufficient to co-ordinate such a redress programme; state supervision would not be necessary. Surely, this is a way AfriForum and similar groups should be keeping busy.

5.2 For a more consensus-oriented politics

South Africa's Constitution, along with all other democratic states south of the Sahara, took over the competitive, multi-party style of democracy that is the norm in Western societies. A party has the legal right to govern roughly in proportion to the number of votes that it has obtained via fair procedures, and it has the legal right to make decisions that are expected to benefit its particular constituency. The system of vying for votes and granting the power to make political decisions to those with the most is so ubiquitous that people are often inclined to *identify* democracy with it. However, a form of democratic decision making different from the adversarial, majoritarian form is possible, and is probably what respect for people's dignity as beings capable of community requires.

The interpretation of *ubuntu* articulated in this article seems to support a consensus-oriented political system of the sort that has been common in traditional African cultures and that some Southern and

other African philosophers have proposed for a modern society.[51] Consider a system in which legislators are initially elected by majority vote, but are not tied to any political party, and, once elected, seek unanimous agreement amongst themselves about which policies to adopt. Instead of trying to promote any constituencies' interests, politicians would seek consensus about what would most benefit the public as a whole. There are two major reasons for thinking that respect for the dignity of people's communal nature supports this kind of democracy.

First, return to the rationale above for thinking that democracy of some form or other is required. If what is special about us is, in part, our capacity to share a way of life with others, then that is going to require sharing political power, that is, to forbid authoritarian government. Majoritarian democracy is a sharing of power but only in a weak sense, giving to minorities the amount of power they are owed in accordance with the number of votes they have acquired, and giving them the fair opportunity to become majorities in elections scheduled every four or five years or so. A more intense sharing of power would accord every citizen not merely the equal ability to become the ones who determine law and policy, but also 'the right of representation with respect to every particular decision',[52] the right not to be utterly marginalised when major laws and policies are actually formulated and adopted. And it is reasonable to think that when laws obtain the consent of all elected representatives, it is more likely that they would benefit the public as a whole, and not merely a subset, which solidarity would prescribe.

While the first argument for a consensus-based democracy is that respect for our communal nature requires legislators to *exhibit* substantial identity and solidarity with themselves and with citizens whenever they make major decisions, the second argument is that it also requires them to act in ways that are likely to *foster* substantial identity and solidarity, or at least prevent great division and ill-will, in the long run. Consensus-oriented decision making would best avoid creating legislative minorities and their constituencies who repeatedly lose out to the majority, becoming marginalised, alienated and losing out. Generally speaking, in order for a state to produce a sense of togetherness and to facilitate cooperative, mutually beneficial endeavours both between it and citizens and between citizens themselves, its officials must not act for the sake of any subset of the population related to them in some

51 See especially Ramose (n 12 above) 135-152; LJ Teffo 'Democracy, kingship, and consensus: A South African perspective' in K Wiredu (ed) *A companion to African philosophy* (2004) 443. A particularly careful and influential exposition is in K Wiredu *Cultural universals and particulars: An African perspective* (1996) 172-190.

52 Wiredu (n 51 above) 173.

way, a principle entailing that it is unjust for a politician to act for the sake of a constituency.[53]

This reasoning points, then, to a respect in which South Africa's Constitution should be changed to recognise a 'human right to decisional representation'.[54] Although it enshrines people's human right to democratic participation in government, those favouring an *ubuntu*-oriented perspective on politics might see it as an expression of the 'conqueror's' will for imposing a competitive, majoritarian form.[55] It is worth debating whether people's human right to political power is best understood as requiring a constitutional amendment forbidding any party polity, and whether the Constitution would be on the whole a more coherent document if it were so changed.

Even if no formal alteration of the Constitution is on the cards, the present reasoning entails that the dominant political majority of our time in South Africa, the African National Congress, should be less opportunistic with regard to the power it has legally secured. It should be doing much more to promote a *de facto*, if not *de jure*, government of national unity. Some concrete steps it could take would be to appoint many more persons from other parties to positions in cabinet, and to make appointments based much more on qualifications and much less on patronage. Working together, South Africans could do more.

5.3 For a less retributive employment of deadly force

The last major issue of controversy that I address in order to illustrate *ubuntu* as a moral theory has to do with the way the state ought to respond to serious criminal infractions. Lately there has been debate about when the police may 'shoot to kill', with the Constitutional Court having rendered a unanimous judgment on the topic in *S v Walters*[56] that is guiding a bill that will likely soon become law.[57] The present conception of human dignity entails that the bill and the judgment on which it is based are flawed.

To keep things simple, let us focus on the Court's conclusion in *S v Walters*, which is that deadly force is ordinarily not permitted unless the suspect poses a threat of violence to the arrester or others or is

53 Which principle also neatly entails the injustice of nepotism and cronyism, as I argue in T Metz 'African moral theory and public governance' in FM Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 345-348.

54 Wiredu (n 51 above) 180.

55 This phrasing is found in both M Ramose 'An African perspective on justice and race' (2001) 3 *Polylog* http://them.polylog.org/3/frm-en.htm (accessed 31 October 2011); and LJ Teffo 'Monarchy and democracy' (2002) 1 *Journal on African Philosophy* http://www.africaknowledgeproject.org/index.php/jap/issue/view/1 (accessed 31 October 2011).

56 *S v Walters* (CCT 28/01) (2002) ZACC 6; 2002 4 SA 613; 2002 7 BCLR 663.

57 See a draft of the bill amending the Criminal Procedure Act, 1977, regarding the use of deadly force, http://www.justice.gov.za/legislation/bills/2010_cpamendbill.pdf (accessed 31 October 2011).

suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.[58]

According to this logic, a police offer may shoot or otherwise use deadly force against a suspect under one of two independently sufficient conditions: Either (a) the suspect poses a threat of serious harm to others that cannot be prevented without deadly force; or (b) the suspect has already done or threatened serious harm to others and cannot be detained without deadly force. The relation between (a) and (b) is one of disjunction, not conjunction. That is, the court has ruled that posing a threat of serious harm to others is *not* necessary in order for deadly force to be justified; the mere facts of having already done serious harm (or having threatened to do so) and being unable to be apprehended without deadly force are enough to be liable to be shot.

Following the theoretical interpretation of *ubuntu* given above, the (a) clause is apt. Recall that respect for a person's capacity for friendliness depends on the way he has exercised it, so that, more specifically, one does no disrespect to another by being unfriendly toward him, if doing so is necessary to help those threatened by, or who have become victims of, his unfriendliness. Hence, if someone is threatening to kill or to impose comparable harm on others, and the only way to prevent that is to inflict deadly force on him, his capacity for friendliness would not be degraded thereby and he would not have a suffered a human rights violation.

However, the *ubuntu*-based conception of human dignity entails that the (b) clause should be deleted and that it would constitute a human rights violation not to do so. Unfriendliness is permissible, on this conception, only as a counteractive response to proportionate unfriendliness. That is, unfriendliness must serve the function of helping those who have been, are being or will be victims of comparable unfriendliness. This is another place where *ubuntu* is 'forward-looking', directing a moral agent to consider the likely consequences of her behaviour, and not to determine whether her behaviour is appropriate solely in light of facts about the past.

Of course, detaining someone who has committed a serious crime so that he may be tried in a court of law is a future 'benefit' to be sought. But *that* expected good is *not* one that is proportionate to the use of deadly force. The court requires an officer to ensure that deadly force is proportionate, but a sufficient discharge of that obligation, for the court, is reasonably deeming deadly force to be proportionate *to the crime already committed* in the past, not to harm that deadly force could avert in the future.

58 *Walters* (n 56 above) para 54.

In a broad sense, the court's judgment is grounded in retributive ideals, not ones that most of those who accept an *ubuntu* ethic would uphold, or at least not adherents to the theoretical articulation of it presented here. Retributivism is the 'pay-back' theory of punishment and of negative responses more generally. According to this perspective, a punishment or other critical response should be based solely on the nature of the crime or other wrongdoing committed. The worse the misdeed, the harsher the penalty or harm should be, in order to give the person what he deserves. A retributive approach considers it 'good in itself' that the amount of suffering be increased in the world, so long as it is directed toward the guilty; imposing suffering need not be expected to produce any future benefit such as preventing a similar or greater suffering.

While the court would likely disavow such baldly retributive sentiments, its judgment in *S v Walters* coheres more with a retributive approach than with an *ubuntuist* one, since it does not require the use of deadly force to serve the function of preventing a comparable harm. Instead, according to the court, a sufficient condition for the justified use of deadly force is the fact of having already done comparable harm (along with being unable to be apprehended for it without deadly force). Furthermore, for the court, the point of using deadly force justifiably can be to ensure that a person suspected of serious wrongdoing is tried in a court of law, that is, is sentenced to a penalty roughly comparable in severity to his wrongdoing.

One might reply on behalf of the court that someone who has already committed a serious crime is likely to do so again. But there are two damning responses to be made here. First, it is simply not true. It is a commonplace in criminology, for example, that the recidivism rate for murder is low, not only in relation to other serious offences, but also in absolute terms. Most of those who have killed others did so under extreme circumstances that are unlikely to be repeated. Second, and more deeply, even if it were true, the (a) clause, or something very close to it, would be sufficient to cover the issue, as it permits deadly force when necessary to prevent serious harm.

6 Conclusion

In this article I have sought to defend the idea that *ubuntu*, suitably interpreted, can serve as a ground of public morality. This defence has taken the form of showing that even if various construals of *ubuntu* up to now have been vague, collectivist or anachronistic, it can be interpreted in a more promising way. My approach has been to draw upon salient beliefs and practices commonly associated with talk of *ubuntu* (and cognate terms in Southern Africa) in order to construct a moral theory, a basic principle indicating how all wrong actions differ from right ones.

The favoured moral theory is that actions are right, or confer *ubuntu* (humanness) on a person, insofar as they prize communal relationships, ones in which people identify with each other, or share a way of life, and exhibit solidarity toward one another, or care about each other's quality of life. Such a principle has a Southern African pedigree, provides a new and attractive account of morality, which is grounded on the value of friendship, and suggests a novel, companion conception of human dignity with which to account for human rights. According to this conception, typical human beings have a dignity by virtue of their capacity for community or friendliness, where human rights violations are egregious failures to respect this capacity.

More specifically, I argued that human rights violations are well understood as failures to treat people as specially capable of friendly relationships, often taking the form of extraordinarily unfriendly behaviour that is not required to protect the victims of another's proportionately unfriendly behaviour. I contended that this conception of human rights violations straightforwardly accounts for many different human rights in South Africa's Constitution and naturally entails certain *prima facie* attractive ways of dealing with contemporary moral dilemmas relating to land reform, political power and deadly force.

If I am correct that the interpretation of *ubuntu* provided here both accounts for a wide array of intuitive human rights and can provide concrete guidance for resolving present-day disputes about justice, then the three criticisms regarding vagueness, collectivism and anachronism have been rebutted successfully. Something fairly called *ubuntu* can indeed be reasonably thought to serve as the foundation of a public morality for South Africa and other contemporary societies.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Indigenous peoples and the right to culture: The potential significance for African indigenous communities of the Committee on Economic, Social and Cultural Rights' General Comment 21

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Summary

Indigenous peoples in Africa currently experience a range of human rights abuses. Recently, the United Nations Committee on Economic, Social and Cultural Rights released General Comment 21 on the right to take part in cultural life (ICESCR article 15(1)(a)). This contribution examines the relevance of General Comment 21 and its interpretation of article 15(1)(a) for African indigenous groups.

1 Introduction

The United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee) recently released General Comment 21: Right of

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everyone to take part in cultural life (art 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)).[1] The article discusses the General Comment and highlights its potential significance for indigenous peoples in Africa.

Indigenous peoples in Africa currently experience a wide range of human rights violations.[2] Many of these violations may be classified as forms of discrimination based on their cultural identities.[3] Other violations concern their survival as culturally-distinct communities.[4] In General Comment 21, the ESCR Committee identifies clear obligations to respect, protect and promote the right to culture, binding on all ICESCR state parties. The Comment is directly relevant to the problems facing indigenous groups in Africa because of the essential and foundational role that 'culture' plays within their communities.

The clarification of the ICESCR right to take part in cultural life – and the identification of specific state obligations in this regard – could be important to indigenous groups in several ways. First, 45 A frican states are state parties to ICESCR[5] and are bound by their obligations under that treaty. States that fail to respect and protect rights of indigenous peoples violate binding treaty obligations.[6] Emphasising states' ICESCR obligations could be particularly important in the case of African countries which have not signed the Declaration on the Rights of Indigenous Peoples.[7] These states include Nigeria, Kenya, Burundi, Ethiopia, Morocco, Rwanda and Uganda[8] – states in which indigenous peoples have experienced difficulties.[9]

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1 E/C 12/GC21 (21 December 2009); ICESCR UN Doc A/6316 (1966); 993 UNTS 3; 6 *ILM* 368 (1967).

2 See discussion below. Problems faced by indigenous peoples are not unique to Africa. Indigenous cultures are also seriously threatened in the Americas, in Asia and the Middle East, in Australasia and in parts of Europe. See United Nations report *The state of the world's indigenous peoples* (2009).

3 See discussion below.

4 See discussion below.

5 Forty-eight of 53 African Union member states have signed ICESCR and 44 of these have ratified it; http://treaties.un.org/ (accessed 31 March 2011). (Morocco is a state party to ICESCR but not a member of the AU.)

6 See A Chapman 'A "violations approach" for monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23; and *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1998) 20 *Human Rights Quarterly* 691.

7 A/61/L.67/Annex.

8 One hundred and forty-three states voted in favour of the Declaration, including 34 African states. Burundi, Kenya and Nigeria abstained from voting. Several African states were absent from the Assembly on the day of adoption. These included Ethiopia, Morocco, Rwanda and Uganda; http://www.un.org/News/Press/docs/2007/ga10612.doc.htm (accessed 20 February 2011).

9 African Commissions's Working Group of Experts on Indigenous Populations/Communities *Report of the African Commissions's Working Group of Experts on Indigenous Populations/Communities* (2005).

Second, the ESCR Committee's General Comment can be used to clarify or amplify rights found in other documents. This could be especially important for the interpretation of the African Charter on Human and Peoples' Rights (African Charter),[10] which expressly provides that interpretation of the Charter should 'draw inspiration from international law on human and peoples' rights', particularly as emanating from the United Nations (UN) and its specialised agencies.[11] Here again, emphasising states' ICESCR obligations could be especially useful if states object to interpretations of the African Charter that are based on the Declaration of the Rights of Indigenous Peoples.[12]

Third, states may be more willing to recognise the ESCR Committee's interpretation of the right to culture than they have been to recognise the full spectrum of indigenous peoples' rights as set out in the Declaration of the Rights of Indigenous Peoples. Many African states have been wary of recognising collective rights for indigenous peoples in their territories, fearing that this might lead to ethic division and strife[13] – or even to demands for secession.[14] General Comment 21 avoids some of the topics that historically have proved most controversial, such as the questions of self-determination and state obligations to provide or return land to indigenous communities.[15] Instead, the General Comment adopts a comparatively minimalist approach, and projects a tone of harmony and inclusiveness: Respect for indigenous rights is founded on the most fundamental of all human rights – respect for human

10 OAU Doc CAB/LEG/67/3 rev 5; 1520 UNTS 217; 21 *ILM* 58 (1982).

11 Art 60.

12 The African Commission referred to the Declaration on Indigenous Rights when interpreting the African Charter and concluding that Kenya has violated its Charter obligations. See *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case). See also African Commission Working Group Report (n 9 above) where the African Commission compares the rights set out in the Declaration to those in the African Charter. For commentary on these processes, see KN Bojosi & GM Wachira 'Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 382; and AK Sing'Oei & J Shepherd '"In land we trust": The Endorois' communication and the quest for indigenous peoples' rights in Africa' (2010) 16 *Buffalo Human Rights Law Review* 57.

13 See eg comments made by Rwanda during debates on the Draft Declaration on 26 November 2006 (United Nations. 61st General Assembly. Third Committee. 53rd Meeting UN Doc GA/SCH/3878) http://www.un.org/News/Press/docs/2006/gashc3878.doc.htm (accessed 20 February 2011).

14 See Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples (2007) http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf (accessed 20 February 2011) para 16, reporting such fears on behalf of the African group of states.

15 For a discussion on these controversies, see W van Genugten 'Protection of indigenous peoples on the African continent: Position seeking, and the interaction of legal systems' (2010) 104 *American Journal of International Law* 29; Bojosi & Wachira (n 12 above) and Sing'Oei & Shepherd (n 12 above).

dignity – and the protection and promotion of indigenous rights are aimed at preventing conflict rather than creating it.[16]

2 Defining 'indigenous peoples'

The term 'indigenous peoples' is notoriously difficult to define.[17] The UN has paid attention to the position of the world's indigenous peoples for more than 40 years,[18] but has never adopted a formal definition of 'indigenous peoples', not even in the 2007 United Nations Declaration on the Rights of Indigenous Peoples. Erica-Irene Daes, Rapporteur of the United Nations Working Group on Indigenous Populations, has suggested that 'the concept of "indigenous" is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world'.[19] The African Commission's Working Group of Experts on Indigenous Populations has decided that a 'strict definition of indigenous peoples is neither necessary nor desirable'.[20] Indigenous peoples themselves have rejected the adoption of a strict definition because of the danger that it might exclude some groups which ought to qualify as indigenous.[21]

Despite the dangers of an overly-precise definition, it is important to have some guidelines on the kinds of communities that qualify for the protections sought by indigenous peoples. The African Commission's Working Group tried to achieve this (while avoiding the problems of a prescriptive 'definition') by outlining the most important 'characteristics' of indigenous peoples as an aid to identification of indigenous communities.[22] This is the approach followed by most contemporary commentators and intergovernmental groups.[23]

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16 See comments in African Commission Working Group Report (n 9 above) 88.

17 The definitional problems have been discussed by numerous scholarly commentators and experts working within international and regional organisations. See discussion below, and SJ Anaya *Indigenous peoples in international law* (2002) 3; B Kingsbury 'Indigenous peoples in international law: A constructivist approach to the Asian controversy' (1998) 92 *American Journal of International Law* 414 419.

18 The UN began its first study on discrimination against indigenous peoples in 1971. R Barsh 'Indigenous peoples in the 1990s: From object to subject of international law?' (1994) 7 *Harvard Human Rights Law Journal* 33.

19 E Daes *Working Paper on the Concepts of Indigenous People* UN Doc E/CN.4/Sub.2/AC.4/1996/2 para 9 http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/ 2b6e0fb1e9d7db0fc1256b3a003eb999/$FILE/G9612980.pdf (accessed 31 March 2011).

20 African Commission Working Group Report (n 9 above) 87.

21 *Report of the Open-Ended Inter-Sessional Ad Hoc Working Group on a Permanent Forum for Indigenous Peoples in the United Nations System* (Commission on Human Rights, 55th session 25 March 1999, E/CN.4/1999/83 http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/ E.CN.4.1999.83.En?Opendocument (accessed 20 February 2011) para 56.

22 See African Commission Working Group Report (n 9 above) 86.

23 African Commission Working Group Report (n 9 above) 87.

Most attempts to define or otherwise identify characteristics agree on the following criteria: Indigenous groups are non-dominant or marginalised communities who are culturally distinct from the majority population. Daes suggested four core criteria that may be used to identify indigenous peoples:[24]

1 occupation and use of a specific territory;
2 voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;
3 self-identification, as well as recognition by other groups, as a distinct collectivity;
4 an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.

The African Commission's Working Group has identified similar criteria, emphasising the importance of self-identification 'as indigenous peoples or communities' and noting that[25]

> their cultures and ways of life differ considerably from the dominant society and their cultures are under threat, in some cases to the extent of extinction. A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon. They suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society. They often live in inaccessible regions, often geographically isolated and suffer from various forms of marginalisation, both politically and socially.

The ESCR Committee does not define the term 'indigenous peoples' in General Comment 21. For the purposes of this paper, we will not define 'indigenous peoples', but will nevertheless use the term to refer to groups of people who display the criteria suggested by Daes and the African Commission's Working Group.

3 Defining 'culture'

Like 'indigenous peoples', 'culture' is a difficult term to define. Essentially, the word 'culture' can be used to indicate 'a way of life of a people'.[26] Anthropologist Robert Murphy suggests that culture is[27]

> the total body of tradition borne by a society and transmitted from generation to generation. Thus it refers to the norms, values and standards by which people act, and it includes the ways distinctive in each society of ordering the world and rendering it intelligible.

24 As quoted in African Commission Working Group Report (n 9 above) 93.
25 African Commission Working Group Report (n 9 above) 89.
26 R Williams *Keywords: A vocabulary of culture and society* (1983) 90.
27 R Murphy *Culture and social anthropology: An overture* (1986) 14.

In terms of the Fribourg Declaration on Cultural Rights, the term culture 'covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and meanings that they give to their existence and to their development'.[28]

Hadjionnou describes indigenous culture as 'the core body of beliefs, knowledge, traditions and way of life that is passed on from generation to generation in indigenous communities'.[29] This body of beliefs, knowledge, traditions and ways of life form an integral part of the lives of indigenous peoples and are manifested in the form of ancestor worship, religious or spiritual ceremonies, oral tradition and rituals which have been passed down through the generations.[30]

For indigenous peoples, culture is the outcome of their relationship with other human beings, plants, animals, and the land on which they dwell.[31] This relationship between the culture of indigenous peoples and their immediate environment distinguishes them from members of mainstream society.[32] These indigenous customs and traditions are central to the lives of indigenous peoples and constitute their existence as separate entities.[33]

The importance of culture to indigenous peoples cannot be overstated, because the cultural distinctiveness of indigenous peoples is regarded as 'central to the concept of "indigenous" in international law'.[34] This cultural distinctiveness qualifies these communities for recognition as indigenous peoples. For indigenous communities, protection of their culture is essentially the same thing as protecting their very existence as groups that are special and different from mainstream society. Without this cultural distinction, indigenous communities risk assimilation into the dominant society, thereby leading to their extinction as indigenous peoples. At present, this distinctiveness is threatened in many parts of Africa.

4 Threats to indigenous communities in Africa

The report prepared under the auspices of the African Commission's Working Group[35] identifies a number of threats to the continued

28 Art 2(a) (definitions).

29 M Hadjionnou 'The international human right to culture: Reclamation of the cultural identities of indigenous peoples under international law' (2001) 8 *Chapman Law Review* 201 204.

30 Hadjionnou (n 29 above) 204.

31 A Xanthaki *Indigenous rights and the United Nations standards: Self-determination, culture and land* (2007) 204.

32 See Daes (n 19 above) para 69.

33 See generally Daes (n 19 above).

34 Daes (n 19 above) para 43.

35 African Commission Working Group Report (n 9 above).

existence of indigenous communities in Africa. It is useful to look at some of the reported problems in order to understand the relevance and significance of the ESCR Committee's General Comment 21 on the Right to Culture.

4.1 Loss of traditional lands and resources

The distinct cultures and ways of life of indigenous peoples are usually premised on the availability of land and traditional resources. In Africa, many indigenous groups have traditionally used a hunter-gatherer economy, and the continuation of this way of life is dependent on continued access to appropriate land and resources. Access to these resources is seriously threatened. In several Central and West African countries, for example, forest peoples, such as the Batwa,[36] have been evicted from forests to create conservation areas, particularly sanctuaries for gorillas.[37] Indigenous forest dwellers have also lost traditional resources when areas of forest have been sold to logging companies and effectively destroyed.[38] In Southern Africa, San hunter-gatherers have lost land to conservation areas.[39]

In East Africa, the traditional economies of pastoralist indigenous groups, such as the Maasai of Kenya and Tanzania, are threatened by the shrinking availability of suitable grasslands.[40] Land taken from the Maasai during the colonial period was not returned to them after independence, but allocated to more dominant groups in those countries.[41] The Maasai continue to lose their lands to conversation areas[42] or large-scale commercial agricultural operations.[43]

Loss of traditional lands and resources is caused both by direct government activity and by activities of commercial companies, including foreign multinationals. For example, the activities of oil company Shell have seriously harmed the resource base and traditional way of life of the Ogoni people in Nigeria.[44] Mining, logging and large-scale commercial farming operations have had devastating impacts on indigenous groups elsewhere on the continent.[45]

Loss of traditional land does not only affect communities' ability to subsist, but may also have implications for traditional cultural, spiritual and religious ceremonies. The Maasai, for example, have lost the sacred

36 This group is known by different names in different parts of Africa. See African Commission Working Group Report (n 9 above) 16.

37 African Commission Working Group Report 22-23.

38 African Commission Working Group Report (n 9 above) 27.

39 African Commission Working Group Report (n 9 above) 23.

40 African Commission Working Group Report (n 9 above) 24.

41 As above.

42 African Commission Working Group Report (n 9 above) 25.

43 African Commission Working Group Report (n 9 above) 33.

44 African Commission Working Group Report (n 9 above) 28.

45 See footnotes to previous paragraph.

site Endoinyio Oolmorauk, which was used for an important spiritual rite by every generation of Maasai from both Tanzania and Kenya.[46]

4.2 Assimilation policies

In many parts of Africa, indigenous communities have been threatened by deliberate assimilationist policies pursued by the national government. For example, the governments of Algeria and Morocco have pursued a policy of 'Arabisation', which has had a negative impact on the distinct cultural and linguistic identity of Berber-speaking communities who live in those countries.[47]

Many governments view the traditional economic practices of indigenous communities as 'backward' or old-fashioned.[48] They favour agriculture over hunter-gatherer or pastoralist economies, and some national governments perceive 'development' as synonymous with fixed settlement and initiation of agricultural projects.[49] Thus, traditional ways of life may be deliberately destroyed in the name of progress, motivated by an underlying philosophy favouring adoption of 'modern' mainstream economic practices by hunter-gatherer and pastoral communities.

4.3 Discrimination

The African Commission's Working Group reports that there is 'rampant discrimination' against indigenous communities in many parts of Africa.[50] For example, the Batwa of Central Africa experience extreme discrimination and ostracisation in many countries, and are considered 'undeveloped, intellectually backward, hideous, unsavoury characters, or sub-human'.[51] In parts of the Congo, outsiders have nicknamed the

46 African Commission Working Group Report (n 9 above) 41. The Report does not discuss problems experienced by the pastoralist Endorois community in Kenya. However, in its complaint to the African Commission, the group complained of loss of grazing land and other resources as well as loss of key ceremonial and religious sites when their lands were proclaimed conservation areas. *Endorois* case (n 12 above).

47 African Commission Working Group Report (n 9 above) 42-44. See also comments by Rwanda during debates on the Draft Declaration 26 November 2006 (n 9 above) declaring that the state favoured 'integrating indigenous peoples' into mainstream society.

48 African Commission Working Group Report (n 9 above) 37. For a discussion of Botswana's view of the San's hunter-gatherer lifestyle as 'backward', see K Lehmann 'Aboriginal title, indigenous rights and the right to culture' (2004) 20 *South African Journal on Human Rights* 86 94.

49 African Commission Working Group Report (n 9 above) 33, discussing Ethiopian development policies. See also 36 discussing attitudes to hunter gatherers in the CAR.

50 African Commission Working Group Report (n 9 above) 34.

51 African Commission Working Group Report (n 9 above) 35, referring specifically to Rwanda and Burundi.

Batwa *la viande qui parle* (the animal that speaks).[52] Societal attitudes are reinforced by government attitudes and policies which tend to perceive the Batwa's hunter-gathering lifestyle as 'primitive and shameful for national heritage'.[53]

The discrimination and social ostracisation experienced by the Batwa have a negative impact on their ability to find employment or to benefit from state social services such as health and education. Personnel at government clinics and hospitals are reluctant to treat Batwa patients.[54] Teachers and fellow students ridicule Batwa school children, often leading to the Batwa children's departure from the educational system.[55]

The Batwa also experience discrimination in the enforcement of law and order. Authorities are unlikely to act effectively when the Batwa have been victims of crime (including violent crime and murder),[56] and the Batwa have been victims of arbitrary arrest and erroneous court judgments.[57]

4.4 Marginalisation and exclusion from political, judicial and development processes

All over Africa, indigenous communities are among the most marginalised and impoverished population groups. Indigenous groups face impoverishment through the loss of their traditional resources, and they experience widespread social exclusion and difficultly when trying to make use of social services such as health and education. A lack of education and social prejudice makes it difficult for indigenous people to find alternative means of subsistence.[58]

Development projects are sometimes biased against the traditional practices of indigenous peoples. Very often they take the form of large agricultural projects, which might displace indigenous hunter-gatherer and pastoralist communities.[59] Even when communities are permitted to retain their lands, governments might exclude indigenous groups from development projects unless they are willing to change to pre-

52 African Commission Working Group Report (n 9 above) 53. In the Congo, the Batwa are known as the Babendjelle.

53 African Commission Working Group Report (n 9 above) 37, referring specifically to the Congo.

54 African Commission Working Group Report (n 9 above) 52-54.

55 African Commission Working Group Report (n 9 above) 56.

56 African Commission Working Group Report (n 9 above) 38-39, referring specifically to Uganda.

57 African Commission Working Group Report (n 9 above) 35, referring specifically to Rwanda and Burundi. See also 38 for examples from Uganda and 39 for examples from the DRC.

58 African Commission Working Group Report (n 9 above) 55.

59 African Commission Working Group Report (n 9 above) 30.

ferred methods of subsistence.[60] Indigenous communities often live in remote areas and do not receive infrastructural development, including the supply of clean water.[61]

Indigenous communities are often excluded from political participation – even when the decisions concern them and their access to resources.[62] They have also found it difficult to access legal and political channels through which to prevent the loss of land, to claim the return of their traditional lands, or to claim compensation for land which has been irretrievably lost.[63]

5 Committee on Economic, Social and Cultural Rights' General Comments

The ESCR Committee has played a pivotal role in interpreting ICESCR and clarifying the Covenant's entitlements and obligations. The UN Economic and Social Council (ECOSOC) is responsible for administering ICESCR[64] but, in 1987, ECOSOC established the ESCR Committee, comprising human rights experts, to assist in these supervisory duties. In practice, the ESCR Committee is the supervisory body for the Covenant.[65]

The ESCR Committee has attempted to spell out states' ICESCR obligations by developing a framework for thinking about rights in terms of obligations to respect, protect and promote the rights; core minimum obligations; and specified violations.[66] From time to time, the Committee issues General Comments aimed at 'clarify[ing] the normative issues [of ICESCR] for the States Parties'.[67] Although the General Comments are not formally binding,[68] the ESCR Committee regards

60 African Commission Working Group Report (n 9 above) 33.

61 African Commission Working Group Report (n 9 above) 50-51.

62 African Commission Working Group Report (n 9 above) 44-47.

63 African Commission Working Group Report (n 9 above) 25 (Tanzania) 23 (DRC); 28 (Cameroon).

64 P Hunt *Reclaiming social rights: International and comparative perspectives* (1996) 19.

65 M Sepúlveda *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 29 32 89-90; P Alston 'Out of the abyss: The challenges confronting the new UN Committee on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 332.

66 Hunt (n 64 above) 13-14.

67 Comment made by the Committee in Summary Record of the 28th meeting, 15 November 1999 (UN Doc E/C.12/1999/SR.28) para 41, as quoted by Sepúlveda (n 65 above) 41. Authority to issue General Comments was given by ECOSOC in Resolution E/RES/1987/5.

68 M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 104; J Harrison *The human rights impact of the World Trade Organisation* (2007) 133; H Haugen 'General Comment No 17 on "authors' rights"' (2007) 10 *Journal of World Intellectual Property* 53 55.

its General Comments as 'authoritative interpretations' of ICESCR,[69] intended as firm guidelines for the practical implementation of the binding ICESCR rights.[70] The Committee is 'the most authoritative bod[y] ... for determining the scope of the obligations imposed by the [ICESCR]'[71] and state parties that fail to act upon the Committee's recommendations 'show bad faith in implementing their Covenant-based obligations'.[72]

General Comments carry 'considerable legal weight'[73] and provide valuable 'jurisprudential insights' into the issues discussed by the ESCR Committee.[74] The Committee has developed its practice of issuing General Comments into a 'quasi-legislative mechanism' and the resulting 'quasi-legal status' of the Comments 'is to an extent supported by the tacit acceptance by States Parties to ICESCR, both to the ongoing formation of General Comments, and their utilisation as a mechanism by which to assess state reports under the Covenant'.[75] The General Comments have also been used when interpreting human rights in national and regional courts, further evidence of the Comments' high standing and quasi-legal status.[76] Over time, the General Comment has become 'a distinct juridical instrument ... that bears some resemblance to the advisory opinion practice of international tribunals'.[77]

The ESCR Committee has examined many of the ICESCR rights in detail.[78] It has established clear benchmarks and has identified specific

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69 See E/C.12/1999/11 para 441 and E/C.12/1999/11 para 52.

70 Sepúlveda (n 65 above) 88. See also Haugen (n 68 above) 55, describing General Comments as the 'most authoritative clarification' of ICESCR.

71 Sepúlveda (n 65 above) 88.

72 As above; UN Fact Sheet 16 para 6. This would contravene art 26 of the Vienna Convention on the Law of Treaties. Sepúlveda's argument is that states have binding obligations to meet their ICESCR commitments. The ESCR Committee's General Comments clarify more precisely what the ICESCR commitments entail. The General Comments provide states with lists of specific steps which should be implemented. States that fail to implement the steps identified by the ESCR Committee thus fail to abide by their treaty commitments.

73 Craven (n 68 above) 104.

74 Hunt (n 64 above) 20.

75 Harrison (n 68 above) 133.

76 D Chirwa 'The right to health in international law: Its implications for the obligations of state and non-state actors in ensuring access to medicine' (2003) 19 *South African Journal on Human Rights* 541 546; D Cassel 'The globalisation of human rights: Consciousness, law and reality' (2004) 2 *North Western University Journal of International Human Rights* 6 77.

77 T Buergenthal 'The Human Rights Committee' as quoted by Sepúlveda (n 65 above) 41.

78 General Comments on specific ICESCR rights include General Comments on the Right of Everyone to Take Part in Cultural Life (General Comment 21); Right to Work (General Comment 6); Right to Food (General Comment 12); Right to Education (General Comment 13); Right to Water (General Comment 15); and Right to Housing (General Comments 4 and 7). It has also issued comments on more general obligations such as General Comment 3 on the nature of states' obligations, General Comment 8 on economic sanctions and General Comment 9 on the domestic

conduct that will be regarded as violating ICESCR obligations. This jurisprudential development has enormous advantages for those wishing to rely on the binding human rights set out in ICESCR.

5.1 'Tripartite typology'

One of the jurisprudential tools used by the ESCR Committee is the 'tripartite typology' which shows that all human rights give rise to duties to 'respect', 'protect' and 'fulfil' the rights. The duty of respect requires states to refrain from any action which would interfere with a particular right: 'The broad idea is not to worsen an individual's situation by depriving that person of the enjoyment of a declared right.'[79] The obligation to protect requires states to 'prevent violations of such rights by third parties'.[80] The obligation to fulfil requires states 'to take appropriate legislative, administrative, budgetary, judicial and other measures toward the full realisation of such rights'.[81]

5.2 Minimum core

Another useful tool developed by the ESCR Committee is the identification of the 'minimum core' of the ICESCR rights. General Comment 3 sets out the concept of the 'minimum core obligation' as follows:[82]

> The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, or the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would largely be deprived of its *raison d'être*.

These minimum core obligations are in principle non-derogable: If they are not fulfilled, states will be regarded *prima facie* as having violated the rights concerned.[83] The Committee has recognised, however, that 'any assessment of whether a state has discharged its minimum core

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application of the Covenant. All ESCR Committee General Comments are available from http://www2.ohchr.org/english/bodies/cescr/comments.htm.

79 H Steiner & P Alston *International human rights in context: Law, politics, morals* (2000) 182.

80 Maastricht Guidelines (n 6 above) para 6.

81 As above.

82 ESCR Committee General Comment 3: The nature of states parties' obligations (UN Doc E/1991/23) para 10.

83 Maastricht Guidelines (n 6 above) para 9. A Chapman 'Core obligations related to the right to health and their relevance for South Africa' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 35 37; S Russell 'Minimum state obligations: international dimensions' in Brand and Russell (above) 11 16; S Leckie 'Another step toward indivisibility: Identifying the key features of violations of economic, social and cultural rights' (1998) 20 *Human Rights Quarterly* 81 98.

obligations must also take account of resource constraints applying within the country concerned'.[84] Leckie points out:[85]

> At the most fundamental level, any failure by a state to comply with an international legal obligation must first be examined in terms of whether the state concerned is unable to implement an obligation or if the state is decidedly unwilling to do so.

The Committee stresses, however, that[86]

> in order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

The approach thus shifts the burden of proof to the state concerned if it claims that it was unable to meet its minimum core obligations because of resource constraints.[87] The Committee goes on to stipulate that[88]

> even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.

Some of the ESCR Committee's General Comments have been emphatic about the non-derogable nature of the minimum-core rights. For example, in General Comment 14 on the right to health, the Committee stated that 'a state party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations ... which are non-derogable'.[89] States must take immediate steps towards the implementation of the minimum-core rights.[90] The minimum core concept is extremely useful for policy setting and bench marking, and could be a powerful tool in international negotiation.[91]

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84 ESCR Committee General Comment 3 para 10.

85 Leckie (n 83 above) 98.

86 ESCR Committee General Comment 3 para 10.

87 Russell (n 83 above) 16; W Felice 'The viability of the United Nations approach to economic and social human rights in a globalised economy' (1999) 75 *International Affairs* 563 573.

88 ESCR Committee General Comment 3 para 11.

89 ESCR Committee General Comment 14 para 47.

90 ESCR Committee General Comment 3: The nature of states parties' obligations (UN Doc E/1991/23) para 1; Leckie (n 83 above) 81 93.

91 For criticism of the use of the minimum core in other ways, see K Lehmann 'In defence of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core' (2006) 22 *American University International Law Review* 163; Russell (n 82 above) 16.

5.3 Meaning of 'progressive realisation'

ICESCR is subject to 'progressive realisation'. Article 2(1) of the Covenant provides that '[e]ach state party ... undertakes to take steps ... to the maximum of its available resources with a view to achieving progressively the full realisations of the rights in the present Covenant. The ESCR Committee has explained that progressive realiation[92]

> should not be interpreted as removing all meaningful content from states parties' obligations. Rather, it means that states parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation of [the rights].

States have *immediate* obligations to 'take steps' towards the full realisation of the ICESCR rights.[93] Examples of such steps might include legislation aimed at achieving a right,[94] or the development and implementation of 'targeted, legally consistent, and sufficiently progressive policies' aimed at the full realisation of economic and social rights.[95]

5.4 Violations approach

The 'violations approach', developed by academics, is intended to complement and improve the ESCR Committee's work in monitoring compliance with ICESCR rights by identifying specific violations.[96]

Chapman[97] identifies three types of violations: those that result from government policies and actions; those related to discrimination; and those resulting from the state's failure to fulfil minimum core obligations as identified by the ESCR Committee.[98] The Maastricht Guidelines[99] further develop the violations approach. Following the tripartite typology, they confirm that states have obligations to respect, protect and fulfil social and economic rights, and actively *violate rights* when they fail to respect, protect or take appropriate measures toward their fulfilment.[100] States also violate the Covenant when they fail to satisfy minimum core obligations identified by the Committee.[101] Violations may occur through acts of commission by states themselves, or by third parties that states fail to regulate properly.[102] Violations can also occur through acts of omission. Listed examples include 'failure

92 ESCR Committee General Comment 14 para 31.

93 ESCR Committee General Comment 3 para 1. Similar language is used in ESCR Committee General Comment 14 para 30.

94 ESCR Committee General comment 3 para 3.

95 Leckie (n 83 above) 93.

96 Chapman (n 6 above) 23.

97 Chapman was the first to set out the approach systematically.

98 Chapman (n 6 above) 24.

99 Maastricht Guidelines (n 6 above).

100 Maastricht Guidelines (n 6 above) para 6.

101 Maastricht Guidelines (n 6 above) para 9.

102 Maastricht Guidelines (n 6 above) para 14(c).

to regulate the activities of individuals or groups so as to prevent them from violating economic, social and cultural rights'.[103] The Maastricht Guidelines stress that states' obligations to protect require them to control activities of private parties, including transnational corporations, and that states are responsible for violations of rights resulting from their failure to exercise control diligently.[104]

6 ESCR Committee's General Comment 21 on ICESCR article 15(1)(a) – the right of everyone to take part in cultural life

General Comment 21 examines article 15(1)(a) of ICESCR,[105] which provides: 'The state parties to the present Covenant recognise the right of everyone: (a) to take part in cultural life.'

Participation in a unique and distinct culture is a core characteristic of indigenous communities, and the General Comment on the ICESCR right to take part in cultural life is thus extremely pertinent to the problems facing indigenous communities in Africa and elsewhere.

The ESCR Committee interprets the term 'culture' as a 'broad, inclusive concept encompassing all manifestations of human existence'.[106] In the context of implementing article 15(1)(a), the Committee notes that culture includes such things as ways of life, languages, religion or belief systems, rites and ceremonies, methods of production or technology, natural and man-made environments, food, clothing and shelter, customs and traditions through which individuals and communities 'express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives'.[107] Thus, the Committee recognises that 'culture shapes and mirrors the values of well-being and the economic, social and political life of individuals ... and communities'.[108] The Committee also recognises the social aspect of culture and cultural participation and notes that cultural rights may be exercised by individuals or 'within a community or group'. By interpreting 'culture' in this broad and inclusive manner, the Committee's Comment acquires direct relevance for the cultural practices of indigenous communities, including their economic practices.

103 Maastricht Guidelines (n 6 above) para 15(d).

104 Maastricht Guidelines (n 6 above) para 18.

105 The ESCR Committee examined another part of art 15 (art 15(1)(c)) on authors' rights in its General Comment 17.

106 General Comment 21 para 10.

107 General Comment 21 para 13.

108 As above.

The General Comment does not focus specifically on rights of indigenous peoples; the Comment focuses primarily on culture in mainstream society. However, in keeping with the contemporary practice of acknowledging and protecting human rights of indigenous populations,[109] the Comment has paragraphs directed particularly to problems experienced by indigenous communities.[110]

It appears that many of the problems currently experienced by indigenous communities could be addressed or alleviated by proper implementation of ICESCR right 15(1)(a) as interpreted in General Comment 21. In the discussion below, we focus on those parts of the Comment that appear to be most helpful in this regard.

6.1 Importance of cultural diversity

As discussed above, the very existence of many indigenous communities is threatened. Preservation of their cultural institutions and ways of life is essential to prevent the cultural extinction of these groups. As a guiding principle, General Comment 21 makes it clear that all ICESCR state parties have ethical and legal responsibilities to prevent this cultural extinction and to maintain cultural diversity.[111]

The ESCR Committee highlights the inherent importance of cultural diversity and notes that[112]

> the protection of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms and requires the full implementation of cultural rights, including the right to take part in cultural life.

The link between culture, identity and human dignity has been extensively explored by political philosophers.[113] The denial or suppression of non-hegemonic cultural identities, or insistence that every community or individual conforms to a hegemonic national culture, is an infringement of human dignity that impacts on the very notion of 'self'.[114] The ESCR Committee has now highlighted the fundamental human rights violation inherent in such practices and has confirmed that ICESCR protects the right to cultural diversity.

With respect to minority groups, particularly, the Committee notes that states have a duty to 'recognise, respect and protect minority

109 See United Nations (n 2 above) 194-195.

110 General Comment 21 paras 36 and 37 are directed specifically to needs of indigenous peoples. Indigenous peoples are also explicitly referred to in other paragraphs (eg paras 49(d) and 50(c)).

111 General Comment 21 para 40.

112 As above.

113 See eg C Taylor *Multiculturalism: Examining the politics of recognition* (1994).

114 Taylor (n 113 above) 34 63 68; KA Appiah 'Identity, authenticity, survival: Multicultural societies and social reproduction' in *Multiculturalism: examining the politics of recognition* (1994) 155.

cultures as *an essential component of the states themselves'*.[115] Thus, instead of attempting to change indigenous cultural practices to conform to those of mainstream society, states must recognise the inherent value of indigenous cultures and 're-imagine' their national identities in ways that embrace the variety of distinct cultural forms found within national boundaries. [116]

In the past, some African governments have effectively denied the existence of 'indigenous peoples' requiring special attention and treatment – they have claimed that 'all Africans are indigenous',[117] thus denying that some groups require particular recognition as 'indigenous peoples'.[118] The General Comment reminds ICESCR member states that they have legal obligations to acknowledge and recognise the diversity of cultures within national boundaries and to respect, protect and promote minority and indigenous cultures. States must ensure that their legislation and policies respect the rights of everyone to their cultural identity and practices, particularly minorities and indigenous peoples.[119]

The General Comment also highlights the importance of community. The practice of culture is an inherently social activity.[120] With regard to indigenous peoples, the ESCR Committee calls on states to take measures to 'guarantee' that exercise of the right to take part in cultural life 'takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples'.[121] The Committee notes that the strong communal dimension of indigenous peoples' cultural life is 'indispensable to their existence and well-being'.[122] States therefore have an obligation to recognise indigenous peoples as *groups* that require protection and which have the right to practice their culture communally.[123] However, the Committee does not link this to politi-

115 General Comment 21 para 32 (our emphasis).

116 See Taylor (n 113 above) for a discussion of national identity and multiculturalism.

117 African Commission Working Group Report (n 9 above) 88.

118 Recently, African governments have been more accepting of the concept 'indigenous peoples'. Adoption of the African Commission Working Group Report by the African Commission was an important milestone in this regard. In 2010, Kenya changed its Constitution to recognise the existence of 'indigenous peoples' (Report by the International Work Group for Indigenous Affairs http://www.iwgia.org/sw42636.asp (accessed 20 February 2011). This was in part a response to the African Commission's findings in the *Endorois* case (n 12 above).

119 General Comment 21 para 49(d).

120 See Taylor (n 113 above) 32, arguing that we establish our identities, and particularly our social and cultural identities through social interaction; B Kingsbury 'Claims by non-state groups in international law' (1992) 25 *Cornell International Law Journal* 481 490, discussing rights of cultural groups to 'cohesiveness'.

121 General Comment 21 para 36.

122 As above.

123 Kingsbury (n 120 above) 490.

cal secession from the nation state. Instead, it advocates recognition, accommodation and protection within existing political borders.[124]

6.2 Negative or positive rights: Assimilation and the land issue

The ESCR Committee notes that, as formulated in ICESCR, the right to take part in cultural life 'can be characterised as a freedom'[125] to participate in the culture of an individual's or community's choosing.[126] In part, the right requires that states do not deliberately interfere with cultural practices.[127] ICESCR state parties violate this right if they deliberately interfere with cultural practices or attempt to destroy the culture altogether through the assimilation policies discussed above. The General Comment notes that states have legal obligations to respect the rights of indigenous peoples to their cultural identity and practices, [128] and explicitly mentions assimilation policies as a violation of this duty.[129] Indigenous communities at risk from state policies of these kinds can now point to a binding right in a widely-ratified treaty when arguing for the continuation of their cultural distinctiveness., African states that continue to adopt assimilation policies and deny the existence of indigenous peoples within their territory will be in violation of this legal obligation

However, threats to the existence of indigenous communities are created not only by deliberate assimilation policies. The most serious threats to the survival of traditional cultures are posed by loss of the lands and resources upon which these cultures depend.[130] The ability to exercise the 'freedom' to take part in cultural life is inextricably linked to availability of appropriate land and resources.

The right to continued access to land and other resources has been recognised as an enforceable aspect of the right to culture within the international legal system.[131] The ESCR Committee similarly recognises that continued access to appropriate land and resources is a crucial

124 The collective nature of indigenous peoples' rights as group rights has historically been controversial because of fears that this might lead to demands for secession. See Van Genugten (n 15 above) 44-45.

125 General Comment 21 para 6.

126 General Comment 21 paras 7 & 15(a).

127 General Comment 21 para 6.

128 General Comment 21 para 49(d).

129 General Comment 21 para 49(a).

130 See discussion above.

131 See eg *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada* Human Rights Committee Communication 167/1984 UN Doc Supp No 40 (A/45/40) 1, where the Human Rights Committee found that Canada had violated art 27 of ICCPR (the right to enjoy minority culture) by subjecting the lake to 'modern usage'. The link between the right to culture and traditional economic activities was also recognised in Communication 197/1985 *Kitok v Sweden* UNHR Committee 1987/88, where the UN Human Rights Committee held that art 27 of ICCPR was infringed where a Sami man was prohibited from practising reindeer husbandry – part of his traditional

component of the right to take part in cultural life, particularly for indigenous communities.

The Committee makes it clear that everyone has the right to 'follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions'.[132] Paragraph 36 of the General Comment looks particularly at indigenous peoples and emphasises that the right and freedom of indigenous peoples to practise their cultures[133]

> includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with *respect and protected*, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to *recognise and protect* the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources ...

This obligation to recognise and respect the right of indigenous peoples to their traditional lands and resources is confirmed in several other places in the General Comment. Paragraph 49(d), for example, provides that state parties must[134]

> respect the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life.

States must adopt 'specific measures' (such as appropriate legislation) aimed at achieving this obligation of respect.[135] Thus, it is clear from General Comment 21 that the right to participate in cultural life is infringed where states confiscate land occupied by indigenous groups (for example when creating nature reserves) or fundamentally change its character so that it is unsuitable for traditional cultural practices (for example, by changing grasslands into agricultural land). States must change their policies and practices if they violate this duty of respect.[136]

It is not only states themselves that interfere with traditional uses of indigenous peoples' lands. As noted above, the activities of commercial

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culture. See also Kingsbury (n 120 above) 490 and M Scheinin 'The right to enjoy a distinct culture: indigenous groups and competing uses of land' in TS Orlin *et al* (eds) *The jurisprudence of human rights law: A comparative interpretative approach* (2000) 165. Indigenous peoples' rights to traditional lands are also recognised in ILO Convention 169, arts 5 and 31 and in the United Nations Declaration on the Rights of Indigenous Peoples, arts 11-13.

132 General Comment 21 para15(b).

133 General Comment 21 para 36 (our emphasis and citations omitted).

134 General Comment 21 para 49(d).

135 General Comment 21 para 49.

136 This emerges primarily from General Comment 21 para 49.

companies (some of them foreign) have had an extremely detrimental impact on access to traditional lands and resources.[137] The General Comment makes it clear that member states also have an obligation to *protect* the right to culture against infringement by third parties,[138] including 'private or transnational enterprises and corporations'.[139] The obligation to protect from third party interference applies to the activities listed in paragraph 49.[140]

In addition, paragraph 50(c) specifically notes that states have a duty to protect indigenous peoples 'from illegal or unjust exploitation of their lands, territories and resources by state entities *or private or transnational enterprises and corporations*'.[141] Thus, state parties have a positive obligation to *protect* indigenous peoples' lands and resources from the activities of third parties, such as logging, mining, and large-scale commercial agriculture.

Some human rights scholars have suggested that, where the continuation of a particular culture is dependent on the availability of traditional land and resources, there might be a *positive* obligation on states to *provide* the necessary resources. This applies particularly to land traditionally owned by indigenous groups which has been lost to outsiders or appropriated by the state.[142]

The ESCR Committee recognises that the 'right to take part in cultural life' cannot be understood solely in negative terms. The right also has a very important positive component, giving rise to state obligations to ensure the 'preconditions for participation' and to ensure the 'promotion of cultural life, and access to and preservation of cultural goods'.[143]

In General Comment 21, the Committee identifies many positive steps that are required to ensure *respect and protection* of the right to culture. Many of these positive steps take the form of adopting appropriate policies to safeguard and protect resources already in possession of indigenous and other groups.[144] In some parts of the Comment, the Committee goes further and suggests that states also have positive duties to *provide resources*. For example, paragraph 52(c) clearly

137 See examples discussed above.

138 General Comment 21 para 50.

139 General Comment 21 para 50(c).

140 General Comment 21 para 50.

141 General Comment 51 para 50(c).

142 For discussions on the possibility of positive duties to provide land and other resources in this context, see Lehmann (n 48 above) 116. See also *Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC), where Sachs J considers the possibility of positive duties where a community's 'survival as a distinct cultural group can be said to be in peril' but declines to reach a definite conclusion (para 69).

143 General Comment 21 para 6.

144 These policy-related steps are discussed below.

identifies state obligations to provide financial assistance to artists and others engaged in similar cultural activities.[145]

However, the General Comment does not have a similarly strongly-worded and unambiguous paragraph requiring states *to provide (or return) land* and other resources that indigenous peoples require to participate in their traditional ways of life. Paragraph 54 reads:[146]

> States parties must *provide all that is necessary* for the fulfilment of the right to take part in cultural life when individuals or communities are unable, for reasons beyond their control, to realise this right for themselves with the means at their disposal ...

Despite the wide and inclusive wording of paragraph 54, this paragraph can probably not be interpreted to imply that states have positive obligations to provide the land that might be necessary for indigenous communities to practice their traditional culture. The ESCR Committee lists four examples of positive state activity in sub-paragraphs 54(a) to 54(d), but does not refer to the provision of land. Instead, paragraph 54(a) requires 'enactment of appropriate legislation and the establishment of effective mechanisms' to ensure that peoples can participate in decision making, protect their right to take part in cultural life and claim and receive compensation if their rights have been violated.[147] Paragraph 54(b) concerns the preservation of cultural heritage; paragraph 54(c) concerns cultural education and paragraph 54(d) concerns access to existing libraries, museums and cinemas. Thus, in the context of paragraph 54, 'state provision' takes the form of adopting appropriate policies and establishing appropriate machinery rather than providing the resources themselves.

The General Comment focuses specifically on the traditional lands of indigenous groups in paragraph 36 and states that where indigenous groups have lost their traditional lands and resources without their voluntary and informed consent, states should 'take steps to return these lands and resources'.[148] It is not clear what 'take steps' means in this context, and the Committee does not discuss the return of lost lands elsewhere in the General Comment. As worded in paragraph 36, 'take steps' could imply that the state itself must return lands lost through direct state appropriation. However, 'take steps' could also be interpreted to mean that states should promulgate appropriate legislation or establish appropriate machinery to investigate land loss and facilitate its return. This interpretation would be consistent with the apparent meaning of paragraph 54.

145 General Comment 21 para 52(c).

146 General Comment 21 para 54 (our emphasis).

147 General Comment 21 para 54(a).

148 General Comment 21 para 36.

Usually, the ESCR Committee's General Comments are strongly worded, and positive state duties are set out clearly and unambiguously.[149] General Comment 21 uses clear and unambiguous language in many places, but seems to stop short of identifying positive obligations for states to return or provide land and resources which indigenous people require for the continuation of their traditional ways of life.

6.3 Non-discrimination

As noted above, many indigenous communities face discrimination in their nation states, specifically because of their cultural difference. Frequently, indigenous cultures have been labelled inferior, primitive or even barbaric by mainstream society.

The ESCR Committee makes it clear that ICESCR forbids discrimination on a wide range of grounds,[150] and stresses that 'no one shall be discriminated against because he or she chooses to belong, or not to belong, to a given cultural community or groups, or to practice or not to practise a particular cultural activity',[151] and no one shall be excluded from cultural goods and practices.[152] States may not discriminate against anyone on the basis of their cultural group or identity.[153]

Throughout its existence, the ESCR Committee has shown particular preoccupation with discrimination. This was the direct focus of General Comment 20,[154] and most other General Comments have paragraphs focused particularly on discrimination. The duty of states to avoid and prevent unfair discrimination is a non-derogable core obligation in terms of all ICESCR rights.

The General Comments identify non-discrimination as a non-derogable minimum core right in terms of the right to take part in cultural life.[155] It points out that this can be achieved fairly easily by adopting appropriate legislation (if necessary) and through publicity.[156] As in all General Comments, the ESCR Committee emphasises the rights and needs of 'the most disadvantaged and marginalised individuals and groups' and suggests that even where states face severe resource constraints, these sectors can be protected by adopting appropriate and

149 Eg General Comment 14: The right to the highest attainable standard of health (art 12) (UN Doc E/C.12/2000/4), where the Committee unambiguously lists actual provision of essential medicines as a 'minimum core' obligation from which no derogation is permitted (para 43(d)).

150 Arts 2(3) & 3 ICESCR. See General Comment 21 para 21.

151 General Comment 21 para 22.

152 General Comment 21 para 22.

153 General Comment 21 para 49(a).

154 General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (UN Doc E/C.12/GC20).

155 General Comment 21 para 55.

156 General Comment 21 para 23.

relative low-cost programmes. In particular, the Committee emphasises that[157]

> a first and important step towards the elimination of discrimination, whether direct or indirect, is for states to *recognise the existence of diverse cultural identities* for individuals and communities on their territories.

It is well-established in political and juridical thinking that apparently 'neutral' laws and policies might have differing impacts for different groups of people and that 'equality' and 'non-discrimination' are sometimes best achieved by treating people differently rather than treating everyone in exactly the same way.[158] The Committee's comments are consistent with the understanding that 'non-discrimination' might sometimes require that members of cultural minority groups might require different and special treatment. For example, in its discussion on 'appropriateness',[159] the Committee notes that provision of state services such as health, water, housing and education may impact on cultural diversity and urges states to respect the diversity of cultural practices when providing such services so that they are culturally appropriate for the intended recipients.[160]

6.4 Political marginalisation

Marginalisation is a core characteristic for the identification of indigenous communities. General Comment 21 identifies positive state duties aimed at reducing the marginalisation experienced by indigenous communities, who are often excluded from decision making that affects their rights to take part in and maintain their culture. States must enact appropriate legislation and establish the required machinery to ensure that communities can participate effectively in decision making, 'claim protection of their right to take part in cultural life, and claim and receive compensation if their rights have been violated'.[161]

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157 As above (our emphasis).

158 Frequently-cited pioneering works arguing for special and different treatment that accommodates distinct cultures and ways of life include Taylor (n 113 above); and W Kymlicka *Multicultural citizenship: A liberal theory of minority rights* (1995). For useful recent examinations of substantive versus formal equality, see contributions to (2007) 23 *South African Journal on Human Rights*.

159 General Comment 21 para 16(e).

160 Examples of culturally-inappropriate services are boarding schools provided to San children in Botswana. Parents complained that after attending these schools, children become 'children of the government' (African Commission Working Group Report (n 9 above) 55).

161 General Comment 21 para 54(a).

6.5 State action required

6.5.1 Meaning of progressive realisation

The ESCR Committee is always mindful of the 'progressive realisation clause'[162] and its potential as an 'opt-out' provision for states wishing to avoid their treaty commitments. In this regard, General Comment 21 reminds states that the progressive realisation clause does indeed impose specific duties upon states, and that they have an immediate obligation to 'take deliberate and concrete measures aimed at the full implementation of the right'.[163]

In particular, states must ensure that the right is exercised without discrimination.[164] States must not deliberately interfere with cultural groups or obstruct them from engaging in cultural practices of their choice.[165] Regressive measures are not permitted, and any state taking such measures will have to justify its actions by showing that they had been carefully considered and were justified in the circumstances.[166]

6.5.2 State obligations to respect, protect and fulfil the right

The General Comment then looks at the specific duties within the tripartite typology: state duties to respect, protect and fulfil the right to culture.

The *duty of respect* is primarily negative: States have an obligation not to interfere with the enjoyment of the right to take part in cultural life either directly or indirectly.[167] Where necessary,[168] states must take positive steps to ensure that legislation and policies do not violate the obligations of respect discussed above,[169] for example by discriminating against people based on their cultural group,[170] by forced assimilation,[171] by interference with their use or possession of traditional lands,[172] or by economic development and environmental programmes which impact negatively on the cultural heritage of indigenous groups.[173]

As noted above, states also have positive obligations to *protect* indigenous communities from harmful activities of private third parties.

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162 Art 2(1).

163 General Comment 21 para 45.

164 General Comment 21 para 44.

165 As above.

166 General Comment 21 para 46.

167 General Comment 21 para 48.

168 Eg, if current legislation or policy violates the obligation of respect.

169 General Comment 21 para 49.

170 General Comment 21 para 49(a).

171 As above.

172 General Comment 21 para 49(d).

173 General Comment 21 para 50(b).

Thus, states must take 'positive measures'[174] (including legislation) to protect indigenous communities from commercial companies, and must particularly take steps to protect indigenous communities' lands and resources.[175]

Another aspect of the duty to protect is the protection of people practising particular cultures or religions from 'national, racial or religious hatred' or discrimination of other kinds.[176] States have positive obligations to promulgate and enforce legislation prohibiting such activities.[177]

The duty to fulfil involves direct state action to 'facilitate, promote and provide'.[178] This includes state obligations to take appropriate financial measures directed at the realisation of the right.[179] Positive action required by states includes the adoption of appropriate policies for the protection and promotion of cultural diversity,[180] and the adoption of policies specifically geared towards enabling peoples from all cultural communities to 'engage freely and without discrimination in their own cultural practices ... and choose freely their own way of life'.[181] In this regard, states must take appropriate measures to create conditions that are 'conducive to a constructive intercultural relationship' between various cultural communities 'based on mutual respect, understanding and tolerance'.[182] This should include publicity campaigns aimed at elimination of 'any form of prejudice against individuals or communities, based on their cultural identity'.[183]

States should actively promote the exercise of the right of association for cultural and linguistic minorities.[184] States must take 'appropriate measures' to support minority and other communities in efforts to preserve their culture[185] and states themselves have a responsibility to initiate programmes 'aimed at preserving and restoring cultural heritage'.[186] States also have an obligation to 'provide all that is necessary' for the fulfilment of the right to take part in cultural life where communities do not have the necessary means to realise this right.[187]

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174 General Comment 21 para 50.

175 General Comment 21 para 50(c).

176 General Comment 21 para 50(d).

177 As above.

178 General Comment 21 para 51.

179 General Comment 21 para 52.

180 General Comment 21 para 52(a).

181 General Comment 21 para 52(b).

182 General Comment 21 para 52(h).

183 General Comment 21 para 52(i).

184 General Comment 21 para 52(c).

185 General Comment 21 para 52(f).

186 General Comment 21 para 54(b).

187 General Comment 21 para 54 (noting that the lack of means must be beyond the control of the community concerned).

6.5.3 Minimum core obligations

The Committee identifies five non-derogable minimum core obligations on states aimed at creating and promoting an environment within which communities can participate in the culture of their choice.[188] These minimum core obligations are linked to the more general obligations outlined in the Comment as a whole. They include passing legislation and taking any other necessary steps to guarantee non-discrimination in enjoyment of the right to take part in cultural life,[189] respecting the right of everyone to identify with the community of their choice (and change this choice),[190] respecting and promoting the right of everyone to engage in their own cultural practices,[191] and eliminating 'any barriers or obstacles that inhibit or restrict' a person's access to his or her own culture without discrimination. The final minimum core obligation is specifically focused on indigenous communities and other minority groups, and is directed at ameliorating their political marginalisation: States must permit and encourage minority and indigenous groups to participate in the 'design and implementation of laws and policies that affect them'.[192] Very importantly, states must obtain free and informed prior consent from these communities 'when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk'.[193]

Using its typically uncompromising terminology, the General Comment has a section identifying violations of the right. States will violate their treaty commitments if they do not take the appropriate measures to 'ensure respect for cultural freedoms' or if they fail to take necessary steps 'towards the full realisation of the right within their maximum available resources'.[194] In particular, states must show that they have guaranteed non-discrimination in the exercise of the right.[195]

7 Conclusion

Some ESCR Committee General Comments have been worded very strongly and have clearly spelt out minimum obligations with which state parties must immediately comply if they wish to avoid violating their treaty commitments.[196] General Comment 21 seems to stop

188 General Comment 21 para 55.

189 General Comment 21 para 55(a).

190 General Comment 21 para 55(b).

191 General Comment 21 para 55(c).

192 General Comment 21 para 55(e).

193 As above.

194 General Comment 21 para 60.

195 As above.

196 Eg, General Comment 14 on the right to essential medicines, which identifies immediate, non-derogable obligations to provide essential medicines.

short of requiring states to provide what indigenous communities require most in order to practise their culture: It does not explicitly state that states have a positive duty to *provide land and resources* for this purpose. However, General Comment 21 clarifies other aspects of article 15(1)(a) that create binding rights that are directly useful to indigenous groups in Africa.[197]

States have binding obligations to recognise the existence of indigenous communities and to respect these communities and their cultural practices. States may not practise deliberate assimilation policies. Neither may they do this indirectly by requiring indigenous communities to adopt mainstream economic practices or participate in the mainstream education system. States must take positive steps to prevent discrimination against indigenous communities, whether by state agencies or by other private parties. States must respect the undisturbed possession and use of lands presently occupied by indigenous communities and essential for the practice of their culture. States must also protect this undisturbed possession and use from third party interference, especially by commercial companies. Where indigenous communities have already lost their lands, states must create appropriate machinery and formulate appropriate policies (including legislation if necessary) through which indigenous communities can apply for the return of their lands or for compensation. States must take steps to ameliorate the marginalisation of indigenous communities and, where necessary, must ensure that state services and infrastructure (including education and health services) are accessible to indigenous communities and provided in culturally-appropriate forms. States must also establish policies and machinery to ensure meaningful participation by indigenous communities in political processes that affect them. However, the General Comment stops short of advocating secession or a right to self-determination.

Having highlighted states' obligations, and the rights that accrue to indigenous peoples under article 15(1)(a) of ICESCR, what remains to be seen is the practical impact that General Comment 21 will have on the policies and practices of African states. Could it serve as an important tool for indigenous communities in Africa who wish to hold states to the obligations identified by the ESCR Committee? ICESCR has no formal complaints mechanisms for individuals or groups whose rights have been violated, and the supervision of state compliance with ICESCR obligations relies on ESCR Committee reports.[198]

197 However, the General Comment stops short of advocating secession or a right to self-determination.

198 Sepúlveda (n 65 above) 88.

Under such circumstances, the practical political significance of human rights obligations sometimes seems doubtful.[199] Human rights documents are not necessarily a panacea that immediately solves the problems of those whose rights have been violated. However, the clear identification and specification of human rights obligations are useful for consciousness raising and mobilisation;[200] it assists with the 'internalisation' of human rights norms both by states and by members of society;[201] it gives affected groups a legal 'vocabulary' with which to articulate specific claims;[202] and provides states with the basis for positive agendas when formulating policy.[203] Empirically, most democratic states try to abide by their human rights obligations.[204]

Seen in this light, General Comment 21 provides a useful blueprint for the respect and protection of indigenous rights and the adoption of policies appropriate to the needs of indigenous peoples. In addition, General Comment 21 could provide useful clarification of indigenous rights when interpreting other human rights documents, such as the African Charter. The African Charter expressly permits the use of UN human rights documents in its interpretation,[205] and the African Commission on Human and Peoples' Rights has already referred to the Declaration on Indigenous Rights when adjudicating land claims by indigenous groups.[206] The clear and practical steps required by states as set out in General Comment 21 might be useful for groups who claim violations of their rights to culture and for the African Commission when deciding such disputes.

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199 Goldsmith & Posner, eg, argue that human rights treaties have had virtually no impact on state behaviour. JL Goldsmith & EA Posner *The limits of international law* (2005) 111-112.

200 D Cassel 'Does international human rights law make a difference?' (2001) 2 *Chicago Journal of International Law* 121 124; I Cotler 'Human rights as the modern tool of revolution' in KE Mahoney & P Mahoney (eds) *Human rights in the twenty-first century: A global perspective* (1993) 15; Hunt (n 64 above) 146-147; V Gauri 'Social rights and economics: Claims to health care and education in developing countries' in P Alston & M Robinson (eds) *Human rights and development: Towards mutual reinforcement* (2005) 83.

201 See H Koh 'Why do nations obey international law?' (1997) 106 *Yale Law Journal* 2599 2655, discussing how norms acquire their 'stickiness'; and M Finnemore & K Sikkink 'International norm dynamics and political change' (1998) 52 *International Organisation* 887 917, discussing norm internalisation.

202 N Stammers 'Social movements and the social construction of human rights' (1999) 21 *Human Rights Quarterly* 980 986-987; N Gordon & N Berkovitch 'Human rights discourse in domestic settings: How does it emerge?' (2007) 55 *Political Studies* 243 244.

203 M Robinson 'What rights can add to good development practice' in Alston & Robinson (n 200 above) 33.

204 See generally Cassel (n 200 above); Koh (n 201 above); A Chayes & AH Chayes 'On compliance' (1993) 47 *International Organisation* 175.

205 Art 60.

206 *Endorois* case (n 12 above).

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The relationship between the right of access to education and work, and sub-regional economic integration in Africa

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Summary

After considering the core objective of the sub-regional economic communities (RECs) in Africa and the obligations that human rights impose, this article submits that the right to access education, the creation of employment and the right to access work intra-regionally are central to economic integration in Africa. Consequently, the article analyses how economic integration involves these rights and the extent to which these rights may act as catalysts to deepening economic integration in RECs. It concludes that state parties to the RECs must allow free movement of persons and the right of establishment to enable community citizens to have access to education and work.

1 Introduction

Africa aims to achieve full political integration with a central government, legislative and judicial systems under the umbrella body 'United States of Africa.'[1] To achieve this goal, the African Union (AU) adopted a strategy that starts with economic integration, taking place at two levels: at the AU level through the African Economic Community (AEC)

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1 Accra Declaration, African Union, 9th ordinary session in Accra, Ghana, adopted 3 July 2007.

and at the sub-regional level through the sub-regional economic communities (RECs).[2] The RECs are regarded as the building blocks to the AEC and are expected to incrementally achieve free trade areas (FTAs), customs unions and common markets in and amongst themselves.[3] Arguably, the RECs are intended to merge or filter into the AEC. However, it is currently not clear how such merger will happen, given that the RECs are not parties to the Abuja Treaty and therefore not bound to merge in accordance with the Abuja Treaty.[4] Notwithstanding that the RECs are not parties to the Abuja Treaty, the establishment of free trade areas, customs unions and common markets is also reflected as an objective in the treaties establishing the RECs.[5] However, to underscore the importance of RECs in the establishment of the AEC, a Protocol on the Relations between the African Union and the RECs was adopted in 1998. Particularly, article 13 authoritatively binds RECs to comply with the benchmarks set by the AU to achieve the AEC, while article 22 is indicative of possible sanctions against any REC that fails to achieve the objectives of the AEC Treaty.

Given a goal of economic and eventual political integration, later adopted by the AU but first pursued by the Organisation of the African Unity (OAU), the OAU realised the antecedent need to promote human rights in Africa to redress the massive human rights violations and dislocations caused by conflicts and autocratic post-colonial rule.[6] In any case, it would be even more difficult to attain economic integration where human rights are threatened, thus a need for a stable and conflict-free region becomes a pre-condition.[7] This is so because 'where human rights are protected, open markets will flourish as stability and the rule of law are ensured'.[8] To this end, the human rights system for Africa was created in 1981 through the adoption of

2 Arts 4(1)(d) & 4(2) Constitutive Act of the African Union (Constitutive Act) adopted 11 July 2000, entered into force 26 May 2001, art 3(l) read with the Treaty Establishing the African Economic Community, adopted 1991.

3 Arts 4(d), (g) & (h) Economic Community of West African States Treaty (ECOWAS Treaty), 24 July 1993, 35 *ILM* 660, (1996) 8 *African Journal of International and Comparative Law* 193.

4 RF Oppong 'The African Union, African Economic Community and Africa's regional economic communities: Untangling a complex web' (2010) 18 *African Journal of International and Comparative Law* 93.

5 Art 2(2) East African Community Treaty (EAC Treaty), adopted 30 November 1999, entered into force 2001; art 3(2)(d) ECOWAS Treaty (n 3 above); Southern Africa Development Treaty (SADC Treaty) adopted August 1992 as amended in 2001; SADC Regional Indicative Strategic Development Plan (RISDP), adopted August 2003, para 4.10.5

6 Preamble, para 9 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, 1520 UNTS 217, entered into force 21 October 1986.

7 ST Ebobrah 'Human rights developments in sub-regional courts in Africa during 2008' (2009) 9 *African Human Rights Law Journal* 313.

8 SF Musungu 'Economic integration and human rights in Africa: A comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal* 94.

the African Charter on Human and Peoples' Rights (African Charter).[9] The focus for the discussion is on the relationship between economic integration and human rights, particularly rights to work and to education. The term 'economic integration' in this work is limited to the level of economic integration that the RECs aim to achieve (free trade areas, customs unions and common markets) to the exclusion of other arrangements.

The relationship between economic integration and human rights in Africa has been argued by other scholars.[10] At the continental level, the Abuja Treaty seeks to achieve its objectives in adherence to the promotion and protection of human rights in accordance with the African Charter.[11] In addition, at the sub-regional level, the revised Treaty of the Economic Community of West African States (ECOWAS) obliges ECOWAS to pursue its objectives against the backdrop of the promotion and protection of human rights in accordance with the African Charter.[12] Likewise, the Supplementary Protocol relating to the ECOWAS Community Court of Justice (ECCJ) empowers the Court to receive and determine human rights cases.[13] Further, the East African Community Treaty obliges EAC to achieve community objectives guided by principles of good governance, the rule of law, social justice, and the promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter.[14] In Southern Africa, the Southern Africa Development Community (SADC) Treaty binds the Community to carry out its activities in accordance with human rights, democracy and the rule of law.[15] More distinctively for Southern Africa, SADC adopted the Protocol on Gender and Development.[16]

Over and above the clear relationship established from the norms above, the marriage between human rights and economic integration has long been argued by scholars in the field. For example, Ebobrah relates the reason that the RECs extended their mandate to human rights to the fact that the realisation of economic integration can succeed better in stable and conflict-free political environments.[17] As a result of RECs' commitment to human rights and human rights activism, many human rights violations have been vindicated before

9 African Charter (n 6 above); F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligations' (2004) 48 *Journal of African Law* 1.

10 Ebobrah (n 7 above); F Viljoen *International human rights law in Africa* (2007).

11 Art 3(g) Abuja Treaty (n 3 above).

12 Art 4(g) ECOWAS Treaty (n 5 above).

13 Adopted 19 January 2005, entered into force 19 January 2005, art 9(4).

14 Art 6(d) EAC Treaty (n 5 above).

15 Art 4(c) SADC Treaty (n 5 above).

16 Protocol on Gender and Development, adopted 17 August 2008.

17 Ebobrah (n 7 above) 313.

the tribunals and courts of justice in the RECs,[18] despite the RECs not having their own treaty-based human rights instruments. Of course, human rights protection in these cases has not been without criticism or shortcomings. To this end, in ECOWAS, for example, Ebobrah succinctly analyses the critical issues in the human rights mandate of the ECOWAS Court of Justice ranging from legitimacy to the mandate of the Court.[19] He concludes that the involvement of ECCJ in the human rights protection 'creates potential for resistance by ECOWAS member states, as well as potential conflict with national and international institutions'.[20] In Southern Africa, the involvement of the SADC Tribunal in the protection of human rights saw the Tribunal suspended indefinitely pending the review of its mandate.[21]

On the other hand, Musungu focuses on the relationship between economic integration and human rights at the AU and sub-regional levels. He holds that 'civil and political rights are inherently critical in ensuring the rule of law and places checks on governmental power in relation to administrative and judicial activities that affect trade'.[22] Other than civil and political rights, Musungu identifies the link between socio-economic rights and regional integration. In particular, he argues that 'trade rules and the idea of economic liberalisation may also mean that the rules limit states in terms of welfare policies that are inextricably linked to socio-economic rights'.[23]

In summing up Ebobrah and Musungu's expositions on the relationship between human rights and economic integration, Odinkalu takes the following position:[24]

> Integration is an imperative response to the contradictory tendencies of globalisation, nationalism, and the potential institutional arbitrariness of individual states, which tend to undermine the universal protection of human rights. In these circumstances, the continuing sustainability of the promise of human rights in Africa depends significantly on effective international and regional oversight of state conduct. For this purpose, regional integration and human rights mutually reinforce one another in binding legal commitments and regional institutions for their implementation. Far from being mutually antagonistic, they are now mutually interdependent and overlap in defining the scope and functions of sovereign territoriality in Africa.

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18 Eg *Mike Campbell (Pvt) Limited & Another v Zimbabwe* (2007) AHRLR 141 (SADC 2007); *Katabazi & Others v Secretary-General of the East African Community & Another* (2007) AHRLR 119 (EAC 2007).

19 ST Ebobrah 'Critical issues in the human rights mandate of the ECOWAS Court of Justice' 2010 (54) *Journal of African Law* 1.

20 Ebobrah (n 19 above) 25.

21 P Mpofu 'SADC Tribunal not suspended: Salamao' http://www.zimonline.co.za/Article.aspx?ArticleId=6288 (accessed 6 September 2010).

22 Musungu (n 8 above) 89.

23 As above.

24 C Odinkalu 'Regional integration and human rights in Africa' PhD thesis, London School of Economics, May 2008.

Taking Ebobrah, Odinkalu and partly Musungu's ideas further, and extrapolating the relationship between regional integration and human rights, Viljoen focuses strongly on socio-economic rights and submits that 'the heart of sub-regional integration would beat in vain if it does not provide a lifeline to those living in poverty'.[25] In explaining Viljoen's proposition, one must highlight the effect of economic integration on states. On that note, when states integrate, they pool together some of the prerogatives of nation-state sovereignty.[26] For example, to further economic integration, they sometimes remove tariffs and non-tariff barriers on imports from other states within the block. This may be seen at first glance as an obstacle for individual countries within the block of economic integration to fulfil the rights of their respective nationals or everyone within their jurisdiction due to a loss of revenue. However, integration is not done simply for the sake of integration or to impoverish other countries but, properly done, it is a vehicle that facilitates a level playing field for all member states within the block to fulfil human rights obligations in their respective jurisdictions.[27] To this end, Viljoen submits that[28]

> ceding sovereignty to intergovernmental arrangements has value to the nationals of states concerned only if it results in an improvement in their material well-being, and if the sub-regional space allows human rights to prosper in ways that were impossible in the nation state.

Viljoen advocates a clear nexus between economic integration and human rights, particularly socio-economic rights, and this is the line of argument of this article.

Of course, not all integration is equally good. For instance, free trade is mostly closely associated with neoliberal policies that have created greater rather than lesser inequality and has trapped developing countries in policies that were not followed by the rich countries in their own paths to development.[29] Therefore, only integration that promotes human rights is worth pursuing, as Viljoen pointed out.

Although it may be argued that RECs were not created for the promotion of human rights, but rather for increased trade and improved economies of member states, there is a link between human rights and one of the primary objectives of the RECs,[30] which is improving the standard of living of their people. Such improvement of the standard of living is linked closely to the realisation of socio-economic rights.[31]

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25 Viljoen (n 10 above) 8.

26 M Holland *European integration: From community to union* (1994) 6.

27 Viljoen (n 10 above).

28 Viljoen (n 10 above) 495; Musungu (n 8 above).

29 S Suri 'Free trade enslaving poor countries' http://www.ipsnews.net/news.asp?idnews=37008 (accessed 3 March 2011).

30 Art 2(b) EAC Treaty (n 5 above); art 3(1) ECOWAS Treaty (n 5 above); art 1(a) SADC Treaty (n 5 above).

31 Viljoen (n 10 above) 497.

Of importance is the further submission made by Viljoen that 'regional economic integration is not a goal in itself, but a means to an end – eradication of poverty'.[32] Thus, it goes without saying that the eradication of poverty and improvement of the standard of living are fundamentals to the realisation of socio-economic rights.

Having recapitulated on the desired relationship between human rights and a particular form of progressive economic integration in Africa, the article supports Viljoen's position that holds that socio-economic rights should have and do have a direct link with economic integration in the RECs. From the point of view of the link between economic integration and socio-economic rights, the article, while acknowledging the interdependency of rights, argues that the right to access education in the region, the 'states' moral obligation'[33] to create employment and the right to access work in the region are integral to economic integration in Africa, and that there is a mutual relationship between these categories. As such, the article analyses how economic integration involves the rights in question, and the extent to which the promotion or denial of these rights, intra-regionally, can deepen or frustrate the envisaged economic integration in the RECs.

2 Normative and analytical framework of the right to education and the right to work

To the extent that the African Charter does not elaborate on the right to education, the 'duty to create employment' and the right to access work, reference will be made to the Declaration on Economic, Social and Cultural Rights (Pretoria Declaration).[34] In addition, reference will be made to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is the first legally-binding international instrument to guarantee the right to education and the right to access work.[35] In any event, far from being antagonistic, the United Nations (UN) treaties and African treaties are mutually reinforcing in Africa.[36]

32 Viljoen (n 10 above) 496.

33 Under international human rights law, there is no positive obligation on the part of states to provide individuals with employment or jobs. However, states are encouraged to have specialised services to assist and support individuals in order to enable them to identify and find available employment. In addition, states are encouraged to adopt measures aimed at achieving full employment. See General Comment 18 – The Right to Work, adopted on 25 November 2005, UN ESCR Committee, 35th session, UN Doc E/C.12/GC/18 (2006) paras 12(a), 19 & 26.

34 Declaration on Economic, Social and Cultural Rights (Pretoria Declaration), adopted December 2004, African Commission on Human and Peoples' Rights 36th ordinary session.

35 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, GA Res 2200 (XXI), UN GAOR, 21st session, UN Doc A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976.

36 Art 60 African Charter.

Since this article is on the RECs, it is important to explain how RECs relate to the norms cited. To this end, it has been said above that the RECs do not have their own human rights treaties, and that they expressly rely on the AU's treaties as well as UN treaties. Specifically, the RECs courts of justice and tribunals have held states accountable for violating the African Charter, thus implying that the provisions of the African Charter are binding on the RECs.[37] This is so because most of the RECs, as indicated earlier, in their respective treaties and protocols, undertook to achieve their objectives against the backdrop of the promotion and protection of human rights in accordance with the African Charter,[38] such that the African Charter has been viewed as a basis for the common regional human rights standard and a normative framework for the RECs.[39] Besides, except Morocco, all African states are parties to the African Charter, and this can cause the RECs' courts and tribunals to apply the African Charter to the extent that their members are parties to the African Charter. Some scholars have even argued that the African Charter itself has made it possible for RECs to apply it because it does not grant exclusive supervisory powers to any institution.[40] Other than the specific mention of the African Charter, the RECs' treaties further make reference to the general principles of international law, and this has made it possible for RECs' courts and tribunals to adjudicate over UN treaties. Specifically, regarding the application of UN human rights provisions as a normative framework for the RECs, Ebobrah explains as follows:[41]

> To the extent that all [the RECs] member states are members of the UN and have acceded to the UN Charter, the positive obligation to respect human rights that is found in the UN Charter binds the [respective RECs] member states. [Also,] universal ratification of the UN Charter similarly places a binding obligation on [the RECs] as international organisation[s], especially from the perspective of article 103 of the UN Charter. At the very minimum, there is a duty on [the RECs] and [their] member states to join in co-operation under the UN platform to promote and encourage respect for human rights 'without distinction as to race, sex, language and religion'.

Although this position is not without criticism, it is supported in the article.

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37 n 18 above.

38 Eg, art 4(g) ECOWAS Treaty (n 5 above); art 6(d) EAC Treaty (n 5 above).

39 ST Ebobrah 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice' 2007 (7) *African Human Rights Law Journal* 315.

40 As above.

41 ST Ebobrah 'Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: The case of the Economic Community of West African States' LLD thesis, University of Pretoria, 2009 120, citing LB Sohn 'The human rights law of the Charter' (1977) 12 *Texas International Law Journal* 129.

2.1 Right to education

The right to education has its origins in the non-binding Universal Declaration of Human Rights (Universal Declaration),[42] and it was legally entrenched in ICESCR[43] and other subsequent international and regional treaties. Specifically for Africa, the right to education is provided for in the African Charter, although it is not as elaborate as in ICESCR.[44] Also, SADC adopted a Protocol on Education, the objectives whereof include, amongst others, free movement of students and staff within the SADC region.[45] The SADC Protocol on Education does not speak of the right to education, but regional co-operation in promoting standardisation of educational systems and qualifications and access to education,[46] which can serve as a template for the other RECs. The practical implementation of the SADC Protocol on Education is discussed under section three.

The right to education imposes a number of different obligations but, relevant to this work, the obligations imposed on member states are the following: As far as primary education is concerned, ICESCR requires states to provide free and compulsory education.[47] Unlike primary education, secondary education is not compulsory and not free; rather its realisation in terms of fees is expected to be achieved progressively, and this is in accordance with ICESCR.[48] In addition to the obligations on secondary education, ICESCR adds that the higher education shall be made equally accessible on the basis of capacity.[49] These obligations must be carried out against the principle of non-discrimination, specifically on the ground of national origin.[50] Even though developing countries are exempted from ensuring the realisation of the right to education to non-nationals,[51] it can be argued that individual states within the block of co-operation have done away with this exemption as far as member states to the respective RECs are concerned.[52] In summary, the right to education obliges member states to ensure access to education, which arguably for RECs must be done within the respective sub-regions. It goes without saying, however, that economic development and human development more broadly

42 Art 26 Universal Declaration of Human Rights, adopted 10 December 1948, GA Res 217A (III), UN GAOR, 3rd session UN Doc A/810 (1948).

43 Art 13 ICESCR.

44 Eg art 17 African Charter.

45 SADC Protocol on Education, adopted 8 September 1997, entered into force 31 July 2000.

46 As above.

47 Art 13(2)(a) ICESCR.

48 Art 13(2)(b) ICESCR.

49 Art 13(2)(c) ICESCR.

50 Art 2(2) ICESCR.

51 Art 2(3) ICESCR.

52 Eg, art 3 ECOWAS Treaty (n 5 above).

are highly dependent on deepening opportunities for good quality tertiary education.

2.2 Right to work

The right to work became recognised even before the Universal Declaration or UN Charter. As argued by other scholars, the famous four freedoms, by the then United States of America President Franklin Roosevelt, included the 'freedom from want', thus recognising the right to work so that a person can earn a living, and be free from want.[53] The importance of the right to work was underscored in the Universal Declaration in the sense that, even in the circumstances where one is unemployed; one has a right to social security.[54] From the RECs' point of view, SADC adopted the Charter on Fundamental Social Rights, under which member states bind themselves to provide sufficient resources and social assistance to those without employment.[55]

As far as the normative content of the right to work is concerned, the right to work has since been provided for by the non-binding Universal Declaration,[56] but no subsequent international or regional treaty ventured into elaborating on this right. Nevertheless, ICESCR is, under the circumstances, the most useful binding document to elaborate the right to work. For the purposes of this article, the right to work is limited to article 6, and the discussion does not include article 7 of ICESCR, which provides the right's derivative, that of employment.

Although the opening line of article 6(1) of ICESCR is phrased in a non-binding fashion, '[s]tates [p]arties ... recognise the right to work',[57] it, however, obliges states to take appropriate steps to safeguard this right.[58] The Covenant further clarifies the steps that state parties must take to achieve the enjoyment of the right to work.[59]

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53 PB Baehr *Human rights: Universality in practice* (1999) 32.

54 Art 25 Universal Declaration.

55 Art 10(2) SADC Charter on Social Rights, adopted 26 August 2003.

56 Art 23 Universal Declaration.

57 It is on this basis that the duty to create employment is referred to, by the author, as the moral duty and not the legal duty. However, it is no longer desirable for states to deny their obligations towards the enjoyment of the right to work; states are equally responsible for making the right to work available. See The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Guidelines) (1989) 20 *Human Rights Quarterly* 4.

58 ICESCR (n 35 above).

59 Art 6(2) provides as follows: 'The steps to be taken by a state party to the present Covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.'

The rights discussed above are looked at against the four frameworks from which all socio-economic rights are interpreted,[60] and the discussion is limited to access. In addition, since the article deals with RECs, the right to access education and the right to work will not be based solely on rights granted within particular states; rather access is looked at in terms of the regional framework, for example, the right to access tertiary education within the region of integration and the right to access work wherever it is available in the region without any discrimination, particularly on the basis of nationality.[61]

3 Relationship between the rights to work and education and economic integration

This section deals with the crux of the article, analysing the relationship between the right to access work and the right to access education in the region of integration and economic integration in the RECs. The primary argument is that the envisaged economic integration in the RECs ultimately depends on the rights to access education and work as is discussed below. Furthermore, it is argued below that the intra-regional promotion of the right to access education and the right to access work will deepen economic integration as intended by the state parties, much as their frustration can stifle economic integration.

3.1 How does the economic integration agenda of the RECs involve the rights to access education and work?

The realisation of human rights imposes three obligations on member states, namely, the obligations to respect, protect and fulfil human rights. The discourse around these obligations was introduced by, among other scholars, Shue, who at the time referred to them as the duty to avoid, the duty to protect and the duty to aid.[62] At the primary level, the duty to avoid or the obligation to respect entails that there should be nothing done to violate rights or to deprive people of their rights.[63] At the secondary level is the duty to protect human rights, and the requirement is that people should be protected against a deprivation of their rights.[64] At the tertiary level, states bear the obli-

60 General Comment 13, The Right to Education, adopted 8 December 1999, UN ESCR Committee, 22nd session, UN Doc E/C 12/1999/10 (1999).

61 Although one may argue that developing countries can discriminate against non-nationals in relation to the fulfilment of socio-economic rights under ICESCR, the African Commission has ruled to the contrary; see *Union Interafricaine des Droits de l'Homme & Others v Angola* (2000) AHRLR 18 (ACHPR 1997).

62 H Shue *Basic rights: Subsistence, affluence and US foreign policy* (1980) 51.

63 Shue (n 62 above) 36-53.

64 Shue (n 62 above) 53.

gation to 'fulfil the basic needs (livelihood rights or basic rights)',[65] that is, states are the providers of the contents of human rights. That is so because 'the individual is expected, whenever possible through his or her own efforts and by use of his or her own resources, to find ways to ensure the satisfaction of his or her own needs'.[66]

Focusing on the obligation to provide, the expectation from nationals that states must facilitate and provide for their rights requires a substantial revenue and sustainable economy, which for many African countries is a problem. As a result, African countries came together in different and numerous groupings (RECs) with the aim to enhance the standard of living of their nationals through sub-regional integration.[67] Although the respective treaties of the RECs do not define aspirational 'standards of living', this can be viewed in the light of the Universal Declaration, which provides as follows:[68]

> Everyone has a right to a standard of living adequate for the health and well-being of himself and of his family including food, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability...and other lack of livelihood in the circumstances beyond his control.

Raising the standard of living can be achieved either through social security or the provision of livelihood support. Of course, social security is not a sustainable way to improve the standard of living of people in the long run. Social security is appropriate primarily for the young, the infirm, and the aged, especially in poor countries with weak revenues.[69] As a result, the main focus is on providing the necessary tools for people to earn a living for themselves and their dependents. The author submits that these are largely dependent on the provision of education, the creation of meaningful employment opportunities and accessible employment. Therefore, they are the tools that RECs aim to place at the disposal of people through economic integration. Again, this is so because 'the individual is expected, whenever possible through his or her own efforts and by use of his or her own resources, to find ways to ensure the satisfaction of his or her own needs' such as food, shelter and health.[70] In other words, the primary responsibility to fulfil a person's needs lies with the individual concerned. The state comes in only when the individual cannot do so. However, this is not

65 A Eide 'Article 25' in A Eide *et al* (eds) *The Universal Declaration of Human Rights: A commentary* (1992) 388.

66 Eide (n 65 above) 387.

67 Art 2(b) EAC Treaty (n 5 above); art 3(1) ECOWAS Treaty (n 5 above); art 1(a) SADC Treaty (n 5 above).

68 Art 25(1) Universal Declaration.

69 P Justino 'Social security in developing countries: Myth or necessity? Evidence from India' (2003) http://www.sussex.ac.uk/Units/PRU/wps/wp20.pdf (accessed 13 February 2011).

70 Eide (n 65 above) 387.

as easy as that. For example, as seen in other jurisdictions, South Africa in particular, the cases of *Grootboom* and *Soobramoney* have shown that, even where socio-economic rights are guaranteed in a national constitution, it is not always the case that in the event that one cannot provide for himself, the state will step in.[71] As a result, one must attain a certain level of education, whether formal or informal, to be in a position to get employment and provide oneself with basic needs such as health, food or shelter. Consequently, education becomes a means to, among others, access employment in order to earn a living, although not all qualifications result in employment.[72]

Further, the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) noted the importance of the right to work, and pointed out that 'the right to work is essential for realising other human rights and forms an inseparable and inherent part of human dignity'.[73] Indeed, Grootboom and Soobramoney of South Africa could not enjoy health and shelter, respectively, because they did not have the type of work that enabled them to do so and, in the end, their dignity was compromised. However, this does not mean that all educated persons are employed or are in employment that allows them to realise their needs or that uneducated persons cannot provide for their own needs but, generally, education paves the way for people to get into a better employment sector. Therefore, the involvement of education and work as a means to raise the standard of living in the economic integration agenda of the RECs is well established.

To summarise, despite the fact that RECs have not pronounced themselves on how to raise the standard of living of people, it is argued that this may be done by making education accessible, to create employment that enables people to provide for themselves and to make such employment accessible for all within the entire area of integration. This shows how education and work are involved in the economic integration agenda of RECs. These are the integral rights to sub-regional economic integration if the RECs are to achieve the goal to raise the standard of living of the community.

3.2 How does the promotion/frustration of the right to access education and work, intra-regionally, affect the economic integration agenda of RECs?

This section shows how the promotion or frustration of intra-regional rights to education and work affects economic integration.

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71 *Government of the Republic of South Africa v Grootboom & Others* 2001 1 SA 46 (CC); *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC).

72 K Drzewicki 'The right to work and the rights in work' in A Eide *et al* (eds) *Economic, social and cultural rights* (2001) 223.

73 General Comment 18 The Right to Work (n 33 above) para 1.

Economic integration is largely centred on the penetration of economic borders of states, and equal treatment of local and foreign trade and investment. Many African states are skeptical of doing this, largely because of state sovereignty and the protection of their own economies. Member states of RECs have the ultimate goal to create common markets, thus allowing free movement of factors of production and the adoption of a common policy, among others. This goal seems hard to reach due to fears that, in SADC, for example, once a common market is in place, then people from within the region would leave their home countries and flood the market in South Africa.[74] Thus far, most RECs are based solely on free trade agreements, with a few customs unions. However, little has been done to achieve the ultimate goal – common markets, which have been planned for a long time.[75] The question that follows is: How can the promotion of the rights to access education and work speed up the full integration process in the RECs?

In an attempt to answer this question, the author argues that labour mobility (access to work intra-regionally) is the key to economic integration, particularly for the advanced stage of integration envisaged by the RECs – common markets. Through the promotion of the right to access work and the right to access education throughout the area of integration, member states may find it easier to create common markets, thereby achieving their goal. However, such labour mobility should simultaneously address the most notable threat to deepening integration, namely, flooding the labour markets of richer states within the block.

If properly managed, labour mobility (access to work intra-regionally) can assist in lifting the barriers to trade through economic activities carried out by individuals who have crossed borders to become educated, to find work, and to engage in entrepreneurial activities; other sectors which were not previously integrated will become integrated, thereby allowing spillover which is fundamental to development and hence beneficial to economic integration. The principle of spillover provides that integration by sector cannot be achieved in isolation; as one sector is integrated there will be consequences, prompting other sectors to be integrated.[76] For example, labour mobility may assist in integrating the financial sector through the transfer of hard currency. A good example to illustrate this point is in Albania where the Albanian banks have developed partnerships with banks in the main destination countries for Albanian migrants.[77] To this end, wages sent back to labourers'

74 JO Oucho & J Crush 'Contra free movement: South Africa and the SADC Migration Protocols' (2001) 48 *Indiana University Journal* 141-43.

75 Status of Implementation of the Regional Integration Agenda in Africa, adopted 1 July 2008. 11th ordinary session, Assembly/AU/12/(XI) (Status of Implementation).

76 PC Schmitter 'A revised theory of regional integration' in LN Lindberg & SA Scheingold (eds) *Regional integration: Theory and research* (1972) 235.

77 International Organisation for Migrants (IOM) *World Migration Report* (2010) 48.

home countries through formal banking can result in a harmonised banking system. Consequently, the banking sector is spontaneously harmonised, thus deepening economic integration through spillover. In the same manner, labour mobility (access to work intra-regionally) contributes to the circulation of financial capital in terms of wages,[78] and this has the potential of alleviating poverty in the region, which is core to the RECs.

Relating the idea of spillover to the RECs, one finds that spillover is almost impossible given the current low levels of integration in the economic sector. In addition, political interference leaves little room for automatic spillover contrary to neo-functionalism,[79] which is one of the primary theories underpinning integration in Africa.[80] Therefore, the author submits that it is possible with the promotion of the right of access to work intra-regionally that there can be spillover into economic integration in the RECs. Writing on ECOWAS's failure to implement the Protocol on the Right of Establishment, Adepoju acknowledges the close link to the right of free movement, integration of trade, tariff regimes and the promotion of labour mobility in the sub-region,[81] which the RECs should strive to achieve.

However, the free movement of persons and the establishment in the area of integration, particularly in the RECs where there is uneven economic development among the states, may be problematic.[82] For example, in SADC South Africa is a major power and Nigeria is a major economy in ECOWAS while other states are struggling. So, in a situation where there is uneven development in an area of integration, the tendency is that nationals of poorer states migrate to the richer states to pursue a better standard of living.[83] Consequently, migration

78 H Nassar 'Intra-regional labour mobility in the Arab world: An overview' in Arab Labour Organisation *et al* (eds) *Intra-regional labour mobility in the Arab world* (2010) 31.

79 Neo-functionalism was a response to the need to relate and apply functionalist ideas to integration; see JC Senghor 'Theoretical foundations for regional integration in Africa: An overview' in AP Nyong'o (ed) *Regional integration In Africa: Unfinished agenda* (1990) 20. This theory does not necessarily imply that states have to forego their sovereignty and control over policy, but pooling so much of it as may be necessary for joint performance of the particular task. See Holland (n 26 above) 15. The main feature of neo-functionalism is the idea of automatic spillover which, according to neo-functionalism, means that integration by sector cannot be achieved in isolation; as one sector is integrated there will be consequences, influencing other tasks to be integrated; see Schmitter (n 76 above).

80 Senghor (n 79 above) 234.

81 A Adepoju 'Creating borderless West Africa: Constraints, and prospects for intra-regional migration' UNESCO SHS/2005/MWB/1 (2005) 9.

82 M Trebilcock & R Howse *The regulation of international trade* (2005) 9.

83 An example closer to home is in ECOWAS during the introduction of free movement of persons and the right of establishment where Nigeria had to expel some of the community citizens, estimated in millions, because people wanted to pursue a better standard of living in Nigeria; see JE Okolo 'Free movement of persons in ECOWAS and Nigeria's expulsion of illegal aliens' (1984) 40 *The World Today* 428-436.

improves the labour pool in the receiving country, but causes a brain drain in the sending country – a loss that is not completely rectified by the sending back of wages. This is so because, usually, those who leave their countries are young and skilled, that is, potential producers, while consumers and dependents remain behind.[84] Consequently, this calls for replacement migration, which may be direct or indirect.[85] Direct replacement migration occurs when jobs left by emigrants are filled directly by incoming migrants, while indirect replacement migration occurs when skilled emigrants leave jobs which are filled by workers from lower occupational positions.[86] Often in the case of SADC indirect replacement occurs, particularly with least developed countries such as Lesotho and Zambia, because of low levels of development and a lack of social services. Therefore, the jobs left vacant by departing skilled labourers do not attract foreign skilled labour from the region of integration.

A solution to the insufficiency of replacement migration is brain or labour circulation (circular migration). Here, policies are adopted to promote the return of temporary emigrants to their home countries to participate in economic and human development, hopefully with new skills and networks developed abroad.[87]

In order to counteract the potential negative effects of the brain drain for poorer countries in the RECs and also to prepare countries even better for economic and political integration, member states should strengthen their own internal education and job creation policies. This is the area where regional efforts must come in – to assist poorer member states to create better schools and jobs through, for example, locating community enterprises in poorer countries for job creation. It is for this reason that the Congress of South African Trade Unions (COSATU) in South Africa, while rejecting the SADC Protocol on Trade and 'endorsing' regional integration in SADC, advocated measures to strengthen industry in other SADC countries, especially in those areas where countries have a comparative advantage in order to create jobs in SADC countries to avoid the influx of migrants into South Africa.[88] What COSATU proposed is aimed at ensuring the equal distribution of benefits of integration. This was done by Andean countries, where each country was given the opportunity to establish an industry for which it was best suited. Consequently, all the Andean countries grew in industry, thereby creating job opportunities while increasing the

84 M Jovanovic *The economics of international integration* (2007) 99.

85 Nassar (n 78 above) 22.

86 As above.

87 IOM (n 77 above) 53.

88 COSATU Submission on the SADC Protocol on Trade http://www.cosatu.org.za/docs/subs/1999/ sadctrad.htm (accessed 27 May 2010).

capacity to export to other members within the Pact.[89] Further, in view of the need to create jobs, countries such as the United States invest heavily in their educational system and in research and development (R&D) to create new job opportunities. These same kinds of intensive investments in higher education and in research and development capacity are also needed in Africa, especially if Africa hopes to accelerate its path to development.

Nonetheless, the prerequisite for regional labour mobility is accessible education. This means the same treatment that is given to nationals of a particular state must be extended to the citizens of the block. For example, fees should be the same for all and there should be no visa requirements as these inhibit the right to access education in the region of integration. To this end, ECOWAS aims to enable the free movement of one of the factors of production (labour) and the right of establishment.[90] Once the right of establishment is in place, ECOWAS citizens will be able to access employment and education from anywhere within the region without any permit requirements (work or study permits) and without any discrimination on the basis of nationality, especially in relation to the payment of fees for education. Despite this provision not being in force in SADC, recent developments in which South Africa in response to the Zimbabwean crisis granted Zimbabweans the necessary documents to seek employment in South Africa, are commendable, and indicate some level of commitment to regional integration in SADC.[91]

However, notwithstanding the commitment by SADC states in the Protocol on Education, some SADC host states continue to treat students from other SADC countries as international students in terms of fees, thus discriminating against them on the basis of nationality.[92] The Protocol on Education was signed in 1997 and entered into force in July 2000. Therefore, 31 June 2010 marked 10 years of the Protocol being in effect. Still, there is little equal treatment for students in the SADC region. In fact, the Protocol was supposed to achieve its goal in stages – the first stage was aimed at relaxing and eventually eliminating immigration formalities in order to facilitate freer movement of students and staff within the region.[93] This has not occurred; students

89 E Tironi 'A case study of Latin America' in D Seers & C Vaitsos (eds) *Integration and unequal development: The experience of the EEC* (1980) 52.

90 Supplementary Protocol on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment, adopted 30 May 1990 (ECOWAS Protocol on the Right of Establishment).

91 'Govt steps up plan to issue permits to Zimbabweans' http://www.mg.co.za/article/2010-09-10-govt-steps-up-plan-to-issue-permits-zimbabweans (accessed 12 February 2011).

92 Art 7(5) SADC Protocol on Education, adopted in Malawi on 8 September 1997, entered into force 31 July 2000.

93 Art 3(g) SADC Protocol (n 92 above).

are, to this day, compelled to apply and pay for study permits to study in SADC countries, which is a deterrent to students wishing to study in foreign SADC states.[94] Also, in some SADC states fees remain discriminatory on the ground of nationality: Undergraduate citizens of Lesotho pay R10 740,00 to study a Bachelor of Science degree at the University of Lesotho, while foreign students, including students from SADC countries, pay M30 580,00 to study the same course at that university.[95] However, in other SADC states, nationals and students from SADC countries pay the same fees as citizens, and this is commendable. Nonetheless, this and immigration formalities within the SADC region have far-reaching consequences, such as hindering the exchange and learning of African traditions and thereby slowing down the integration process.[96]

Educational qualifications should be harmonized as well. This is because the right to access education and the right to access work reinforce each other and require educational qualifications to be harmonised throughout the region in order to facilitate the mobility of Africans across Africa for employment.[97] Indeed, harmonised qualifications will expedite the return of education migrants to their countries of origin, reducing the threat of permanent migration and brain drain. At the moment it does not make sense that high school matriculants from Lesotho and Swaziland do not have direct access to tertiary education at South African universities, and of course this may be attributed to the fact that educational qualifications are not harmonised in the SADC region. In comparison, ECOWAS harmonised high school-leaving qualifications so as to enable access to tertiary education in the region. To this end, almost all ECOWAS member states adopted the general certificate of education ('A' and 'O' levels) as the standard secondary school-leaving certificates.[98]

Of course, not only is education important for labour mobility, but also for the integration process in general. To this end, when states venture into an advanced form of integration such as the RECs, education becomes as important to regional economic development as are factors such as transport systems, which facilitate the integration of markets. This is because when countries integrate, their success will depend, in

94 South Africa, Visas and Study Permits, http://www.southafrica.info/travel/documents/ studypermits.htm (accessed 27 January 2011).

95 National University of Lesotho 'Fee structure for the 2010/2011 academic year' http://www.nul.ls/export/sites/default/nul/nuldownloads/Fee_Structure_2010.pdf (accessed 27 January 2011).

96 Art 1 Cultural Charter for Africa, adopted 5 July 1976, entered into force 19 September 1990.

97 S Hoosen *et al* 'Harmonisation of higher education programmes: A strategy for the African Union' (2009) 3 *African Integration Review* 2.

98 United Nations Economic Commission for Africa (UNECA) 'Human resources and labour mobility' 197 http://www.uneca.org/aria1/Chap9.pdf (accessed 17 March 2011).

part, on their common base of knowledge, their ability to anticipate and adapt to rapid changes in technology and trends, and their nurturing of leaders with a regional outlook, and all of these can largely be achieved through the promotion of the right to access education in the area of integration and harmonised educational qualifications.

In Africa, not only is economic integration centred on the removal of trade barriers but also on the development of the continent in terms of technology, infrastructure and otherwise. As a result, the right to education is crucial in economic integration in that, since the size of the market increases, the competition and supply of skills become important ingredients in the complex links between technological opportunities and entrepreneurial decisions. As such, research and development play a crucial role in the innovation process as it sustains a supply of knowledge.[99] Such research and development are highly dependent on the population's educational attainment. Therefore, the promotion of the right to education within the region of integration is vital to successful economic integration in that it creates a hub for technological skills and innovation.

As other scholars have argued, the idea of loyalties is fundamental to successful integration.[100] In particular, according to the functionalists, progress in international economic and social spheres is a precondition for the elimination of political conflict and wars, with the expectation that the needs of an individual will gradually direct his loyalties away from the nation state to the functional international organisation[101] and, for Africa, this would mean directing loyalties to the RECs. In the same manner, neo-functionalists postulate that integration is born as a result of successful transitional institutions, that is, loyalty from nation states to the larger unit.[102] To this end, the author argues that loyalties can easily be directed to the larger units, RECs, if the individuals get meaningful employment and access to education as a result of efforts by the RECs. On the other hand, if individuals remain in poverty due to retrogressive employment policies arising out of revenue cuts and trade diversion in an integration block, it is plausible that individuals will be unable to direct their loyalties to the RECs because the RECs would be regarded as counter-productive. Therefore, the denial of these rights intra-regionally can prevent loyalties from being directed to the RECs, yet loyalty is fundamental to the integration process.

99 Jovanovic (n 84 above) 99.

100 Integration in Africa is best discussed in terms of functionalism and neo-functionalism. This is because African states want to protect national sovereignty while fostering international co-operation, incrementally, through the establishment of regional organisation to promote economic development, and this resonates well in the functionalism and neo-functionalism theories. See Senghor (n 79 above) 18.

101 Senghor (n 79 above) 19.

102 As above.

While the above sections deal with the link between the rights to access education and work and economic integration, this relationship cannot be discussed in isolation from political integration. This is particularly so because African countries aim to establish a pan-African government, that is, political integration. Further, some RECs, such as the East African Community, strive to achieve political integration at the sub-regional level.[103] More importantly, while economic and political integration are two distinct forms of integration, there can be overlaps between the two. For example, a mere free trade area among states does not give rise to political community while economic union and common markets lead to political community because of the creation of central institutions and policies as well as the free movement of labour.[104]

Relating the importance of the right to access education and the right to access work in deepening political integration, it is submitted that political integration involves cultures and social factors, that is, values and interests. The reason is that with political integration, not only are the governments involved, but also people must feel loyalty to the larger unit.[105] As Haas correctly puts it, the expectation is that, as the process of political integration proceeds, values and interests change – they shift from the national governments and will be redefined in the context of regional rather than purely national orientation, and that the national values will be superseded by the geographical new set of beliefs.[106] Shared cultures and values can only be achieved through the interaction of the peoples of the region, something which can be achieved through accessible education and work.

The definition of the right to education underscores its importance in political integration. Thus, education is defined as '[t]he transmission to a subsequent generation of the social, cultural, spiritual and philosophical values of the particular community'.[107] Clearly, the transmission of social, spiritual and philosophical values of the community cannot be achieved without the promotion of access to education within the block of integration. Also, it is only when people share their social and philosophical values within the community that events such as xenophobic attacks in countries such as South Africa would end because South Africans would see Zimbabweans as fellow citizens of the larger

103 Art 5(2) EAC Treaty (n 5 above).

104 Holland (n 26 above) 12.

105 AH Birch *Political integration and disintegration in the British Isles* (1977) 32.

106 EB Haas *The uniting of Europe: Political, social and economic forces 1950-1957* (1958) 13-14.

107 KD Beiter *The protection of the right to education by international law: Including a systematic analysis of article 13 of the International Covenant on Economic, Social, and Cultural Rights* (2006) 19.

unit – SADC.[108] In ECOWAS, harassment on the roads[109] would cease when individuals from different nation states share values and look at each other as belonging to a larger unit – ECOWAS.

4 Conclusion

Despite the novelty that the RECs displayed with their involvement in hearing human rights cases, there is no doubt that sub-regional economic integration in Africa has a direct link with human rights, particularly socio-economic rights. This is especially because one of the main objectives of the RECs – 'improving the standard of living' – is an indication of the commitment to the realisation of socio-economic rights, particularly the right to access education, the moral duty to create employment and the right to access work. This rests on the submission that education and work are core to improving the standards of living, which is the objective of these economic bodies. It is therefore concluded that this objective creates a direct link between economic integration in the RECs and the right to access education and the right to access work, as well as states' obligation to create employment.

Bearing in mind the primary objective of the RECs to raise the standard of living of the people and to achieve free trade areas, customs unions and common markets, it is concluded that if economic integration were to succeed in the RECs, efforts must be made to enable the free movement of persons and the right of establishment. This move would enable community citizens access to education and work, and thus improve the standard of living. This right of intra-regional movement should be supplemented, however, with policies designed to promote brain/labour circulation instead of a permanent brain drain. Nonetheless, once these rights of intra-regional mobility to access education and jobs are realised in the region of integration, they are capable of accelerating and deepening the entire integration process in the RECs. As a result, the mutually-beneficial relationship between economic integration and education/job mobility should be recognised and policies developed to achieve their realisation.

108 D Katerere 'Putting out "fire next time"' *Mail & Guardian* http://www.mg.co.za/article/2010-02-18-putting-out-fire-next-time (accessed 28 February 2011).

109 Status of Integration (n 75 above) 29.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Enhancing the protection of the rights of victims of international crimes: A model for East Africa

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Summary

Victims of international crimes have had little, if any, role and voice in international criminal proceedings. In fact, victims in such proceedings have mostly been mere observers and witnesses. This global practice reflects the status of victims of international crimes as it was until the emergence of the International Criminal Court. The Court has brought about an era where victims of international crimes will not only have a true voice in criminal proceedings, but they will also participate in such proceedings as victims. Of importance is the fact that they are now entitled, by right, to compensation and reparation. The article traces international legal developments relative to the protection of the rights of victims of international crimes. It briefly examines comparable domestic and regional legal frameworks and practices on victim rights protection. The principal aim of the study is to discuss lessons that can be replicated in East Africa as a possible model for the protection of the rights of victims of international crimes.

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1 Introduction

The voices of victims of human rights abuses and their concerns have long been neglected in the criminal justice system. In fact, whereas international and national legal frameworks (including the African Charter on Human and Peoples' Rights (African Charter) and domestic constitutions' bills of rights) contain express provisions for safeguarding the rights of accused persons and perpetrators of crimes, none expressly exists for victims of those atrocities. Indeed, critics of the African Charter point to the absence of a specific provision on the right to an effective remedy, although over the years the African Commission on Human and Peoples' Rights (African Commission) has interpreted the right as a significant deficiency in the protection of human rights in Africa and perhaps a misplaced preoccupation with rights violators.[1]

In recent years, though, there have been marked advances as different legal instruments have acknowledged the place of victims in the criminal justice system. Buoyed by agitation and demands by victims and members of civil society for the recognition and protection of victims of human rights atrocities, the international legal framework has yielded significant normative gains. Indeed, increasingly victims' voices are heard in legal processes that are aimed at bringing an end to the crimes committed against them.[2]

Until the last decade, even where remedies for victims existed, measures tended to end with the indictment and punishment of offenders and perpetrators, on the erroneous assumption that punishing offenders would compensate for the harm or wrong suffered by victims and would restore a much broader international legal order.[3] Victims were also treated as mere witnesses in support of evidence adduced by the prosecution to prove its case. After World War II, the sufferings of victims were noted and prosecutions carried out but nothing substantial was done to alleviate the suffering of victims as they were not accorded any special right to protection, support or reparations and were assigned no other role in the proceedings in their own right as victims rather than just as witnesses.[4] The Nuremberg International Military Tribunal[5] and the Tokyo International Military Tribunal for

1 G Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 442-464; F Viljoen *International human rights law in Africa* (2007) 236-259.

2 S Garkawe 'Victims and the International Criminal Court: Three major issues' (2003) 3 *International Criminal Law Review* 345 346.

3 JM Kamatali 'From ICTR to ICC: Learning from the ICTR experience in bringing justice to Rwandans' (2005) 12 *New England Journal of International and Comparative Law* 89 99.

4 Garkawe (n 2 above) 347.

5 Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 http://avalon.law.yale.edu/imt/imtconst.asp (accessed 29 September 2011).

the Far East[6] conducted trials generally seen as a way of deterring future atrocities. However, victims did not play a major role in those trials.[7]

The establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY),[8] the International Criminal Tribunal for Rwanda (ICTR)[9] and the Special Court for Sierra Leone (SCSL)[10] gave momentum to the promotion and protection of victims' rights. The entry into force of the Rome Statute of the International Criminal Court (ICC) on 1 July 2002[11] heralded a new dawn which is anticipated to improve the participation of victims in criminal proceedings.[12] Articles 5 to 8 of the Rome Statute define international crimes as genocide, crimes against humanity, war crimes and the crime of aggression. The ICC treaty provides for a Victims and Witnesses Unit,[13] and an opportunity for the victims to have legal representation, to participate in proceedings[14] and to receive compensations and reparations.[15]

The article examines the legal framework of victims' participation, their right to reparations, compensations and restitutions with a view to proffering a holistic approach towards the promotion of victims' rights by member states of the East African Community (EAC).[16] There

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6 International Military Tribunal for the Far East (IMTFE) Charter http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml (accessed 29 September 2011).

7 Garkawe (n 2 above) 347.

8 The Statute of the International Criminal Tribunal for Yugoslavia, Security Council Resolution 827 of 25 May 1993.

9 The Statute of the International Criminal Tribunal for Rwanda, Security Council Resolution 955 of 8 November 1994.

10 See Statute of the Special Court for Sierra Leone, established by an agreement between the United Nations and the government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000.

11 Rome Statute of the International Criminal Court UN Doc A/CONF.183/99 of 17 July 1998, entered into force 1 July 2002, http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf (accessed 26 September 2011) (Rome Statute).

12 W Schabas *An introduction to the International Criminal Court* (2007) 328; M Jouet 'Reconciling the conflicting rights of victims and defendants at the International Criminal Court' (2007) 26 *Saint Louis University Public Law Review* 249.

13 Art 43(6) Rome Statute.

14 Art 68(3) Rome Statute; M Cohen 'Victims participation rights within the International Criminal Court: A critical overview' (2009) 37 *Denver Journal of International Law and Policy* 351.

15 Art 75 Rome Statute.

16 The East Africa Community (EAC) is a regional inter-governmental organisation of the Republics of Kenya, Uganda, the United Republic of Tanzania, the Republic of Rwanda and the Republic of Burundi with its headquarters in Arusha, Tanzania. The treaty for the establishment of the EAC was signed on 30 November 1999 and entered into force on 7 July 2000. There is currently an East African Court. However, as provided in the treaty establishing the Court, it does not adjudicate on human rights issues at the moment. The treaty establishing the EAC makes a case for the adjudication of human rights issues in future through the adoption of a protocol

are interesting developments in the EAC that make this study imperative. Uganda and Kenya are currently ICC case and situation countries. The Ugandan government referred a case concerning the Lord's Resistance Army to the ICC in December 2003.[17] The Kenyan case[18] was referred to the ICC by the Prosecutor of the ICC using his *proprio motu* power as provided for in the Rome Statute.[19] Rwanda suffered a vicious genocide that claimed the lives of more than 800 000 Tutsis and moderate Hutus in a hundred days.[20] Burundi is currently setting up accountability mechanisms to deal with the civil wars that occurred in that country.[21] Tanzania is relatively peaceful but not immune to the victims' rights issues besieging its neighbours.

The focus on East Africa is also purely for pragmatic purposes. The authors are more familiar with the region with regard to the work of the ICC, being actively involved in transitional justice processes in the countries under study. However, the lessons emerging from the study should be applicable and indeed replicable in other countries in Africa.

The article begins with a brief survey of the kind of victims of international crimes envisaged. It examines international and regional norms and standards as well as the protection provided by legal frameworks for victims of international crimes. It also surveys *ad hoc* tribunals and

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to operationalise the extended jurisdiction. See art 27(2) of the EAC Treaty. See also EAC 'About the EAC' http://www.eac.int/about-eac.html (accessed 26 September 2011).

17 K Apuuli 'The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) insurgency in Northern Uganda' (2004) 15 *Criminal Law Forum* 391; P Akhayan 'The Lord's Resistance Army case: Uganda's submission of the first state referral to the International Criminal Court' (2005) 99 *American Journal of International Law* 403; H Moy 'International Criminal Court arrest warrants and Uganda's Lord's Resistance Army: Renewing the debate over amnesty and complementarity' (2006) 19 *Harvard Human Rights Journal* 267 271; El-Zeidy 'The Ugandan government triggers the first test of the complementarity principle: An assessment of the first state's party referral to the ICC' (2005) 5 *International Criminal Law Review* 83.

18 Six Kenyans are currently before the ICC going through confirmation of charges hearings on crimes allegedly committed after the 2007 elections. See *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ICC-01/09-01/11 and *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-01/09-02/11.

19 See art 15 of the Rome Statute. For a review of the *proprio motu* powers of the prosecutor, see A Danner 'Enhancing the legitimacy and accountability of the prosecutorial discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510 515.

20 K Nash 'A comparative analysis of justice in post-genocide Rwanda: Fostering a sense of peace and reconciliation' (2007) 1 *Africana Journal* 59 67 http://www.africana-journal.org/PDF/vol1/ vol1_4_Kaley%20Nash.pdf (accessed 31 October 2011).

21 See UN General Assembly Human Rights Council 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Office of the United Nations High Commissioner for Human Rights analytical study on human rights and transitional justice' A/HRC/12/18/Add.1, 21 August 2009 http://www.unrol.org/files/96199_A-HRC-12-18-Add1.pdf (accessed 26 September 2011).

specialised courts with a focus on the evolution of victims' rights. The role of victims in traditional justice mechanisms in Africa is examined, and a brief comparative survey is done of some comparable domestic legal frameworks. The study reflects on the promise of the ICC and the current participation of victims and their right to reparations within the Court's framework. Additionally, the study discusses some of the main challenges for victims' protection in Africa. The article concludes by making a case for an integrated model for victims' protection in the EAC. This is in consideration of the different stages of victims' participation in the criminal justice system. Although the focus of the research is on member states of the EAC, the ideas and suggestions discussed apply to the African continent and beyond.

2 Defining victims of international crimes

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Victims define victims of crimes as[22]

> ... persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Bassiouni argues that the Basic Principles and Guidelines are an international bill of rights for victims.[23] The United Nations (UN) General Assembly in 1985 adopted the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power.[24] The UN Principles define victims as[25]

> ... persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that

22 UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: Resolution adopted by the General Assembly, 21 March 2006, A/RES/60/147, http://www.unhcr.org/refworld/docid/4721cb942.html (accessed 26 September 2011) (Basic Principles and Guidelines) para 8.

23 MC Bassiouni 'International recognition of victims' rights' (2006) 6 *Human Rights Law Review* 203.

24 UN General Assembly A/RES/40/34 adopted 29 November 1985 at the 96th plenary meeting. (UN Principles).

25 Para 1 UN Principles.

are in violation of criminal laws operative within member states, including those laws proscribing criminal abuse of power.

In a resolution adopting the Principles, the UN called on member states to 'implement social, health, including mental health, educational, economic and specific crime prevention policies to reduce victimization and encourage assistance to victims in distress'.[26] The Declaration requires states to adopt legal and practical measures for effective integration of victims in the criminal justice system by granting them access to justice and fair treatment,[27] restitution,[28] compensation[29] and assistance[30] to the extent possible.

The Rome Statute does not define victims. However, the ICC Rules of Procedure and Evidence (RPE) define victims as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the ICC'.[31] The RPE further provides that 'victims may include organisations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.[32]

It is important to note that, while the trial chamber of the ICC in the case of *Prosecutor v Thomas Lubanga Dyilo*[33] had interpreted Rule 85 generously to include any person who had 'suffered harm as a result of the commission of a crime within the jurisdiction of the Court',[34] the Appeals Chamber reversed that ruling restricting victims who are entitled to participate at the Court's proceedings to those whose harm and personal interests in the case may be linked to the charges before the Court.[35]

While there are certainly other crimes which may be considered of international character, including piracy, drug and human trafficking and money laundering, the focus of the proposed model is on victims of the crime of genocide, crimes against humanity and war crimes. The

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26 Para 4(a) of Resolution A/RES/4034 adopting the UN Principles.

27 Para 4 UN Principles.

28 Para 8 UN Principles.

29 Para 12 UN Principles.

30 Para 14 UN Principles.

31 See Rule 85 of Rules of Procedure and Evidence of the International Criminal Court adopted by the Assembly of States Parties 1st session in New York, 3-10 September 2002, ICC-ASP/1/3 http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_ procedure_and_Evidence_English.pdf (accessed 26 September 2011).

32 Rule 85(b) of the RPE of the ICC.

33 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1119, decision on victims' participation, paras 90-92 (18 January 2008).

34 n 33 above, para 90.

35 *Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06-1432, judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, judgment of 11 July 2008, para 2.

principle motivation for focusing on victims of these international criminal acts is due to the fact that their definition and scope have achieved consensus and also the fact that these crimes have increasingly gained notoriety in several places around the world and also in Africa, where there are ICC investigations and prosecutions.[36] National jurisdictions are additionally adopting domestic legislation to implement the Rome Statute of the ICC. It is imperative to suggest appropriate guidelines or models on victims' rights at the domestic level that will complement the activities of the ICC.[37]

3 International protection of victims' rights

3.1 Norms and standards

The Nuremberg and Tokyo Tribunals represent some of the earliest efforts to hold accountable those who committed mass atrocities during World War II against Jews, homosexuals, gypsies, and other religious and ethnic minorities.[38] The adoption of the Universal Declaration of Human Rights (Universal Declaration)[39] in 1948 marked a positive normative response to respect the fundamental human rights and freedoms of individuals. While the Universal Declaration does not contain specific provisions relating to the rights of victims, the instrument is the cornerstone of human rights protection.[40]

The adoption of the International Covenant on Civil and Political Rights (ICCPR),[41] which codified the civil and political rights of the Universal Declaration in a legally-binding instrument, is therefore seen as positive development in the protection of the rights of victims. For example, ICCPR provides that '[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'.[42]

Another important instrument that effectively protects the rights of victims is the Convention Against Torture and Other Cruel, Inhuman

36 The ICC is currently active in Central African Republic, Democratic Republic of the Congo, Kenya, Uganda, Sudan and Libya. ICC 'Situations and cases' http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/ (accessed 29 September 2011).

37 B Olugbuo 'Positive complementarity and the fight against impunity in Africa' in C Murungu & J Biegon (eds) *Prosecuting international crimes in Africa* (2011) 251.

38 R Aldana-Pindel 'In vindication of justitiable victims' rights to truth and justice for state-sponsored crimes' (2002) 35 *Vanderbilt Journal of Transnational Law* 1399 1402.

39 General Assembly Resolution 217 A(III) of 10 December 1948.

40 G Alfredsson & A Eide *'The Universal Declaration of Human Rights: A common standard of achievement'* (1999); J Morsink *The Universal Declaration of Human Rights: Origins, drafting and intent* (1999).

41 General Assembly Resolution 2200A (XXI) of 16 December 1966.

42 Art 9(5) ICCPR.

and Degrading Treatment or Punishment (CAT).[43] CAT provides that a victim of torture is entitled to an enforceable right to fair and adequate compensation and rehabilitation and in the case of the death of the victim, adequate compensation to the survivors of the victim.[44] CAT accords victims a right to compensation and provides for the survivors of victims as well.

UN member states have adopted other treaties and conventions which protect the rights of victims. These include the Convention on the Prevention and Punishment of the Crime of Genocide,[45] the Convention on the Rights of the Child,[46] and the Convention on the Elimination of All Forms of Discrimination Against Women.[47] These conventions and treaties make provision for the protection of vulnerable members of society against discrimination, exploitation and abuse.

The UN Office on Drugs and Crime (UNODC) has also drafted a handbook on justice for victims detailing the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[48] According to the UN Victims' Handbook, an effective way of addressing the needs of victims of crime is to establish programmes that provide social, psychological, emotional and financial support, and effectively help victims within the criminal justice and social institutions.[49] In addition, the UN, in recognition of the important need for effective mechanisms to protect victims, has stated:[50]

> Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victims' right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.

EAC member states have ratified most of the treaties and conventions mentioned above.[51] They have endorsed some of the resolutions and

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43 General Assembly Resolution 39/46 of 10 December 1984, entered into force 26 June 1987 (CAT).

44 Art 14 (1) CAT.

45 Convention on the Prevention and Punishment of the Crime of Genocide General Assembly Resolution 260 A(III) of 9 December 1948 (Genocide Convention).

46 Convention of the Rights of the Child, General Assembly Resolution 44/25 of 20 November 1989.

47 Convention on the Elimination of All Forms of Discrimination Against Women adopted in New York, 18 December 1979.

48 UNODC *Handbook on justice for victims: On the use and application of the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999) 2 (*UN victims handbook*).

49 *UN victims handbook* (n 48 above) iv.

50 Art 11 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, UN A/Res/60/147, adopted 16 December 2005.

51 See the United Nations Treaty Collection Database for a comprehensive review of the status of ratification of international instruments by UN member states, http://treaties.un.org/pages/ Treaties.aspx?id=4&subid=A&lang=en (accessed 26 September 2011).

principles adopted under the auspices of the UN but, beyond ratification and endorsements, nothing much has been done to implement the instruments in national legislation. Several factors, ranging from a lack of political will to the technical manpower requisite to effect the needed changes, are often cited as the cause for the lack of implementation.[52]

4 Evolution of *ad hoc* international criminal tribunals and the protection of victims' rights

4.1 International Criminal Tribunal for the Former Yugoslavia

The ICTY was established through a UN Security Council Resolution[53] after the Balkan conflicts that left the former Yugoslavia completely devastated in the 1990s.[54] It became operational before the ICTR, but they share the same Appeals Chamber. The ICTY was established to punish those who had participated in the mass atrocities committed in the former Yugoslavia. The ICTY Statute does not provide for reparations for victims, but its Rules of Procedure make provisions for the protection of victims and witnesses.[55] Indeed, the ICTY victim's protection strategy, which provides for reparation provisions, is found in the Tribunal's Rules of Evidence and Procedure.[56] Among other things, the ICTY Rules provide for an order of restitution by the Court.[57] Furthermore, the Rules provide that '[p]ursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation'[58] from an accused person who has been found guilty of a crime by the ICTY.

It seems that victims appearing before ICTY have not yet used these provisions.[59] Van Boven argues that the provisions were 'included in the [ICTY] Rules as a symbolic afterthought rather than being expected

52 C Odinkalu 'Back to the future: The imperative of prioritising for the protection of human rights in Africa' (2003) 47 *Journal of African Law* 1 24.

53 UN Security Council Resolution 827 of 1993.

54 ICTY 'About the ICTY' http://www.icty.org/sections/AbouttheICTY (accessed 1 October 2011); D Tolbert 'The International Criminal Tribunal for the Former Yugoslavia: Unforeseen successes and foreseeable shortcomings' (2002) 26 *Fletcher Forum of World Affairs* 5 7; L Barria & S Roper 'How effective are international criminal tribunals? An analysis of the ICTY and the ICTR' (2005) 9 *International Journal of Human Rights* 349 341.

55 Art 15 ICTY Statute.

56 The ICTY Rules of Evidence and Procedure was adopted 11 February 1994 pursuant to art 15 of the Statute of the Tribunal and entered into force on 14 March 1994 (ICTY Rules).

57 Art 98(B) ICTY Rules.

58 Art 106(B) ICTY Rules.

59 G Boas 'Comparing the ICTY and the ICC: Some procedural and substantive issues' (2000) XLVII *Netherlands International Law Review* 267 284.

to produce concrete results'.[60] This is because victims faced several hurdles in the domestic judicial system in obtaining compensation from those indicted by the ICTY.

However, it seems the tide is changing to benefit victims, as the president of the ICTY in 2010 called on the UN Security Council to establish a trust fund for victims of crimes falling within the mandate of the ICTY, arguing that compensation to victims will 'complement the Tribunal's criminal trials, by providing victims with the necessary resources to rebuild their lives'.[61]

4.2 International Criminal Tribunal for Rwanda

The ICTR was established through a UN Resolution[62] after the genocide that occurred in Rwanda in 1994 when more than 800 000 Tutsis and moderate Hutus were killed in a 100-day mass killing unprecedented in the history of that country.[63] Roméo Dallaire, the Force Commander of the UN Assistance Mission for Rwanda (UNAMIR) from 1993 to 1994, argues that the international community failed Rwanda in the sense that the genocide was planned and executed while the UN was present but unwilling or unable to intervene and end the killings.[64] The ICTR was mainly set up to punish those who bear the greatest responsibility for crimes committed in Rwanda. The ICTR made express provisions in its founding Statute for the protection of victims and witnesses.[65] The ICTR Rules of Evidence and Procedure further provided for the establishment of a Victims and Witness Support Unit.[66]

The extent to which these provisions were adhered to leaves much to be desired as the ICTR has been criticised for the way it handled the protection of victims and witnesses.[67] Walsh stated that investigations by the ICTR of rape and sexual violence were inconsistent and unpro-

60 T van Boven 'The position of the victim in the Statute of the ICC' in H von Hebel *et al* (eds) *Reflections on the ICC, Essays in honour of Adriaan Bos* (1999) 77-89.

61 ICTY Statement by Judge Patrick Robinson, President of the International Criminal Tribunal for the former Yugoslavia, to the Security Council on 18 June 2010, http://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/100618_pdt_robinson_un_sc_en.pdf (accessed 26 September 2011).

62 UN Resolution 955 of 1994 adopted by the Security Council at its 3453rd meeting on 8 November 1994.

63 P Clark *The Gacaca courts, Post-genocide justice and reconciliation in Rwanda* (2010) 14.

64 R Dallaire *Shake hands with the devil: The failure of humanity in Rwanda* (2005) 221-262.

65 Art 21 ICTR Statute.

66 Rule 34 ICTR Rules of Evidence and Procedure.

67 International Federation of Human Rights 'Victims in the balance: Challenges ahead the International Criminal Tribunal for Rwanda' (2004) 6 (FIDH Report).

fessional.[68] Research reveals that women will generally only speak comfortably, if at all, of sexual violence to women investigators. The ICTR, however, sent men to interview them which compounded their psychological problems.[69]

For example, one woman who testified in the *Paul Akayesu* trial about the violence against her family and the killing of her husband, was never questioned about sexual violence in Kigali.[70] The issue was first raised by the male prosecutor after her arrival in Arusha. She told him nothing, despite the fact that both her and her daughter had been raped during the genocide. She did not feel comfortable talking about her rape experience because he was a man.[71] Oosterveld believes that the ICTR has made a positive contribution in the prosecution of international sex crimes. She, however, argues that the ICTR has had a negative influence in promoting victims' rights because of the way they were treated by the Court in some instances.[72]

The ICTR argued that protection of victims in Rwanda is the responsibility of national authorities, while the Rwandan authorities responded by saying that they are not kept informed of the movement of witnesses between Rwanda and Arusha, Tanzania, the seat of the ICTR.[73] These allegations and counter-allegations have resulted in suspicion and mistrust of the ICTR and increased the vulnerability of victims who agree to become witnesses.[74]

There were also the logistical problems caused by the inability of the Rwandese government to co-operate with the ICTR when the Tribunal stated that it was going to investigate the soldiers of the Rwandese Patriotic Front for their role in the conflict. Acting on a letter from the Secretary-General of the UN, the Security Council appointed Hassan Bubacar Jallow as the prosecutor of the ICTR,[75] while retaining Del Ponte as the prosecutor for the ICTY.[76]

There were also problems with court proceedings relating to victims who were witnesses. According to a report by the International Federation of Human Rights (FIDH), most witnesses during the trial were upset by the cross-examination by defence lawyers.[77] Referring to

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68 C Walsh 'Witness protection, gender and the ICTR: A report of investigations in Rwanda June and July 1997' http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/witnessProtection/ report_en.php (accessed 29 September 2011).

69 As above.

70 Walsh (n 68 above).

71 As above.

72 V Oosterveld 'Gender-sensitive justice and the International Criminal Tribunal for Rwanda: Lessons learned for the International Criminal Court' (2005) 12 *New England Journal of International and Comparative Law* 119 125.

73 FIDH Report (n 67 above) 10.

74 FIDH Report (n 67 above) 6.

75 UN Security Council Resolution 1505 of 5 September 2003 (SC/7864).

76 Del Ponte had initially acted as the prosecutor for both ICTY and ICTR.

77 FIDH Report (n 67 above) 8.

the content of questions in cross-examination, witnesses mainly commented on the very intimate questions about rape scenes and their involvement. The subject of sex is taboo in Rwanda and generally in Africa, and the fact that they had to describe sexual acts, organs and so on was disturbing in itself.[78]

The ICTR has no compensation packages for victims. The only option available to victims and survivors is to sue the convicted persons in a civil claim in the Rwandese judicial system.[79] In general, victims of crimes being heard by the ICTR are not entitled to claim compensation, notwithstanding their sacrifices and courage to testify in Arusha.[80]

4.3 Special Court for Sierra Leone

The SCSL was established by an agreement between the Sierra Leonean government and the UN.[81] The SCSL is known as a hybrid court in the sense that it benefits both from local and international expertise in its organisation, structure and functioning and operates specifically in the country where the crimes were committed.[82] The SCSL does not provide for reparation or compensation for victims. However, the SCSL Rules of Procedure and Evidence[83] include provisions for the protection of victims and witnesses. It provides that '[i]n exceptional circumstances, either parties may apply to a judge of the Trial Chamber or the Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the judge or Chamber decides otherwise'.[84]

The SCSL Rules also provide that judges may on their own, or at the request of either party of the victim or witness concerned, or the Witnesses and Victims Section, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that these measures are within the rights of the accused person.[85] In protecting victims of sexual assault, the SCSL Rules also provide that the '[c]redibility, character or predisposition to sexual availability of a victim or

78 As above.

79 Rule 106 of the ICTR Rules of Evidence and Procedure; S Vandeginste 'The International Criminal Tribunal for Rwanda: Justice and reconciliation' Issue 11 May 1998 http://www.odihpn.org/report.asp?id=1088 (accessed 29 September 2011).

80 FIDH Report (n 67 above) 10.

81 Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court For Sierra Leone http://www.sc-sl.org/LinkClick.aspx?fileticket= CLk1rMQtCHg%3d&tabid=176 (accessed 29 September 2011).

82 K Ambos & M Othman (eds) *New approaches in international criminal justice: Kosovo, East Timor, Sierra Leone and Cambodia (*2003) 2; E Skinnider 'Experiences and lessons from "hybrid" tribunals: Sierra Leone, East Timor and Cambodia' http://www.icclr.law.ubc.ca/Site%20Map/ICC/ ExperiencesfromInternationalSpecialCourts.pdf (accessed 29 September 2011).

83 Art 14 SCSL Statute.

84 Rule 69 SCSL Rules.

85 Rule 75 SCSL Rules.

witness cannot be inferred by reason of sexual nature or the prior or subsequent conduct of a victim or witness'.[86] This provision protects victims of sexual violence from the undue investigation into their past which is unrelated to ongoing criminal trials. A lack of adequate funding for the Court has hampered its activities, including adequate protection for victims and witnesses.[87]

4.4 Extraordinary Chambers in the Courts of Cambodia

The Communist Party of Kampuchea, also known as Khmer Rouge, in April 1975 took over the capital of Cambodia, Phnom Penh, thereby laying the foundation of a vicious dictatorship aimed at establishing a socialist, viable and homogenous Cambodia.[88] The Khmer Rouge regime was overthrown in January 1979.[89] Three million people perished during the Khmer Rouge reign of terror which lasted for less than four years.[90] The end of the Khmer Rouge period was followed by a civil war that ended in 1998, when the Khmer Rouge political and military structures were dismantled.[91]

In 1997, the government requested the UN to assist in establishing a trial to prosecute the senior leaders of the Khmer Rouge. In 2001, the Cambodian National Assembly passed a law to create a court to try serious crimes committed during the Khmer Rouge regime. This court is the Extraordinary Chambers in the Courts of Cambodia (ECCC) for the prosecution of crimes committed during the period Cambodia was called Democratic Kampuchea.[92] The ECCC makes provision for the participation of victims in the criminal justice process as civil parties.[93] The ECCC Rules of Evidence and Procedure set out the criteria for participation of victims as civil parties.[94] This enables them to seek

86 Rule 96 SCSL Rules of Procedure and Evidence http://www.sc-sl.org/LinkClick.aspx?fileticket=1YNrqhd4L5s%3D&tabid=70 (accessed 29 September 2011).

87 Human Rights Watch 'Bringing justice: The Special Court for Sierra Leone' 7 September 2004 http://www.hrw.org/en/node/11983/section/10 (accessed 29 September 2011).

88 N Jain 'Between the Scylla and Charybdis of prosecution and reconciliation: The Khmer Rouge trials and the promise of international justice' (2010) 20 *Duke Journal of International and Comparative Law* 247 250; N Jain 'The Khmer Rouge tribunal paves the way for additional investigations' (2009) 13 *American Society for International Law Insight* 1-7.

89 Extraordinary Chambers in the Courts of Cambodia 'Introduction of the ECCC' http://www.eccc.gov.kh/en (accessed 29 September 2011).

90 Jain (n 88 above) 250.

91 Jain (n 88 above) 252.

92 ECCC (n 89 above).

93 Rules of Evidence and Procedure of the ECCC providing for General Principles of Victims Participation as Civil Parties http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC% 20Internal%20Rules%20%28Rev.8%29%20English.pdf (accessed 29 September 2011).

94 Rule 23 ECCC Rules of Evidence and Procedure.

reparations and appeal the Chambers' decisions.[95] The law establishing the ECCC is an improvement on what obtains at other *ad hoc* and hybrid tribunals. There are currently conflicting signals from the ECCC on the interpretation of who is a victim. This has led to the exclusion of some victims who are related to those killed by the Khmer Rouge regime.[96] It is hoped that the provisions of the law will lead to the participation of and benefit to victims in Cambodia.

5 Regional protection of victims' rights and the Great Lakes Pact

The entry into force of the Great Lakes Pact (GLP) in June 2008 reflects a desire by member states of the International Conference on the Great Lakes Region (ICGLR) to ensure the protection of victims of international crimes. The Great Lakes Region (GLR) of Africa is made up of 11 states, including all members of the EAC.[97] The first Summit of Heads of State and Government of the GLR adopted the Dar es Salaam Declaration of Peace, Security, Democracy and Development in the GLR in November 2004. The GLP was adopted by the second Summit of the Heads of States and Government in December 2006 to give effect to the Dar es Salaam Declaration.

The GLP is made up of ten protocols[98] and four programmes of action, including the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children and the Protocol for the

95 C Trumbull 'The victims of victims participation in international criminal proceedings' (2008) 29 *Michigan Journal of International Law* 777 779.

96 Open Society Justice Initiative 'Cambodia's Khmer Rouge court excludes victims' voices' 20 September 2011 http://www.soros.org/initiatives/justice/news/cambodia-victims-20110916?utm_source=Open+Society+Institute&utm_campaign=3697e7aff3-justice-20110929&utm_medium=email (accessed 29 September 2011).

97 Member states of the ICGLR are Angola, Burundi, Central African Republic, Congo Brazzaville, Democratic Republic of the Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia.

98 The ten protocols include (1) the Protocol on Non-aggression and Mutual Defence in the Great Lakes Region 2006; (2) the Protocol on Democracy and Good Governance 2006; (3) the Protocol on Judicial Co-operation 2006; (4) the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination 2006; (5) the Protocol Against the Illegal Exploitation of Natural Resources 2006; (6) the Protocol on the Specific Reconstruction and Development Zone 2006; (7) the Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children 2006; (8) the Protocol on the Protection and Assistance to Internally Displaced Persons; (9) the Protocol on Property Rights of Returning Persons 2006; and (10) the Protocol on the Management of Information and Communication 2006. London School of Economics International Humanitarian Law Project: International Conference on the Great Lakes Region http://www.lse.ac.uk/collections/law/projects/greatlakes/ihl-greatlakes-summary-new-docmt.htm (accessed 25 September 2011).

Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity. According to Beyani:[99]

> The [Great Lakes] Pact was ... conceived and designed to provide the legal framework for implementing the Dar es Salaam Declaration. It transforms the commitments assumed under this Declaration and places them on a binding legal footing comprising of ten Protocols and four Programmes of Action identified by the Conference to be areas of priority.

The Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination complements several treaties and conventions aimed at preventing impunity.[100] It further provides that member states 'undertake to take the necessary measures to ensure the provisions of this Protocol are domesticated and enforced and in particular to provide effective penalties for persons guilty of genocide, war crimes and crimes against humanity'.[101]

Although the Protocol calls on member states to co-operate with the ICC,[102] it does not make any specific pronouncement on victims and their participation in the proceedings before national courts of member states. It is unfortunate that the Protocol failed to take into consideration the role of victims in the prosecution of those accused of international crimes as obtainable before the ICC. It is also surprising that the provisions of the Protocol do not seem to have been taken into account by either Kenya or Uganda in the process of implementing the Rome Statute.

The Protocol for the Prevention and Suppression of Sexual Violence against Women and Children (Sexual Violence Protocol)[103] is another important tool in the protection of the rights of victims. The Protocol provides for the establishment of a regional mechanism for providing legal, medical, material and social assistance that includes counselling and compensation to victims of sexual violence in the context of

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99 C Beyani 'Introductory note on the Pact on Security, Stability and Development in the Great Lakes Region' (2007) 46 *International Legal Materials* 173.

100 Eg the Convention against Racial Discrimination: the Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly on 21 December 1965; the Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the UN General Assembly on 18 December 1979; the Geneva Conventions: the four conventions on humanitarian law adopted on 12 August 1949 by the diplomatic conference for drawing up international conventions and their additional protocols adopted on 8 June 1977; the Genocide Convention: the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948.

101 Art 9 Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination adopted 29 November 2006.

102 Art 21 Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination.

103 Protocol for the Prevention and Suppression of Sexual Violence against Women and Children adopted 30 November 2006.

international crimes.[104] A model legislation is annexed to the Protocol which member states are encouraged to adopt. It is hoped that the model legislation will assist member states to adopt national legislations that will meet the aspirations of the protocol and provide effective remedies to victims of sexual violence and international crimes.

6 Traditional justice systems and victims' protection in Africa

6.1 *Gacaca* justice system in Rwanda

The *Gacaca* justice system is an indigenous justice process adopted by Rwanda after the genocide.[105] Most of the public officials and other actors in the Rwandese legal system were either killed or had left the country, leading to a near total collapse of the criminal justice system. The mass atrocities that took place in Rwanda were so severe that the number of those involved in the crimes overwhelmed the criminal justice system.[106] Rwanda made a decision to explore the *Gacaca* justice system to resolve this difficult and complex problem. [107]

In terms of the *Gacaca* system, victims form part of the proceedings and have the right to question accused persons and seek for further information on what happened to their loved ones. However, there is no compensation for victims or survivors in general.[108] Accused persons are asked to confess their crimes by giving a detailed evidence of their participation and showing remorse for their actions. Confessions and signs of remorse are mitigating factors in the *Gacaca* system as they enable the victims to forgive the perpetrators for the atrocities committed against them. They are also seen as parts of a healing process in the sense that accused persons own up to the crimes and seek forgiveness in order to promote reconciliation.

Gacaca was also ingenious in ordering reparations from perpetrators in the form of the return of stolen and destroyed property to victims. Such reparations ranged from some form of monetary compensation

104 Art 6 Sexual Violence Protocol (n 103 above).

105 Legal Notice 8 of 2001; see also I Gaparayi 'Justice and social reconstruction in the aftermath of the genocide in Rwanda: An evaluation of the possible role of *Gacaca* tribunals' (2001) 1 *African Human Rights Law Journal* 78 79.

106 A Algard 'Does the Gacaca system in Rwanda provide an effective remedy in compliance with international norms and standards?' (2005) LLM dissertation, University of Lund, http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1555566&fileOId=1563699 (accessed 28 September 2011).

107 M Sosnov 'The adjudication of genocide: Gacaca and the road to reconciliation' (2008) 36 *Denver Journal of International Law and Policy* 125 243; C Morrill 'Reconciliation and the Gacaca: The perceptions and peace-building potential of Rwandan youth detainees' (2004) 6 *The Online Journal of Peace and Conflict Resolution* 1-66.

108 C Kirkby 'Rwanda's Gacaca courts: A preliminary critique' (2006) 50 *Journal of African Law* 94 107.

to rebuilding and repairing of houses as well as community service. The ability of victims and perpetrators to directly engage with and have a conversation on what would remedy or help heal the past was unique and commendable. However, *Gacaca* has been decried by critics for an absence and/or limitation of the rights of accused persons in the processes at the expense of seeking to extract a confession.[109]

6.2 *Mato Oput* in Uganda

Mato Oput is a traditional cleansing ritual performed by the Acholi ethnic group in Northern Uganda for the purposes of bringing reconciliation and justice after a conflict. It involves the perpetrator acknowledging responsibility, repenting, asking for forgiveness and paying compensation to the victim.[110] It is aimed at achieving a non-violent reconciliation. It is a cleansing ceremony intended to restore social harmony by ending bitter relationships between warring parties.[111] Perpetrators are forgiven their wrongdoings if they accept responsibility for their transgressions, ask for forgiveness and offer compensation to victims.

During the most important part of the ritual, two clans bring together the perpetrators and the victim's family and the two parties share an acrid root drink concocted from the root of a vegetable and served in a calabash.[112] The drink symbolises the two sides putting aside their bitterness and differences by sharing a drink together.[113] Through the process, victims are reconciled with the perpetrators who pay compensation for the crime committed against the victim.

A study carried out by a civil society organisation in Uganda reported that traditional methods of justice varied amongst different ethnic nationalities.[114] However, one cannot rule out the possibility of using traditional means of dispute resolution to deal with some of the crimes that do not

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109 Amnesty International Report, Rwanda, unfair trials: Justice denied AFR 47/08/97 (8 April 1997). D Haile 'Rwanda's experiment in people's courts (*Gacaca*) and the tragedy of unexamined humanitarianism: A normative/ethical perspective' (2008) *Institute for Development, Policy and Management Discussion Paper* 29.

110 See P Bako 'Does traditional conflict resolution lead to justice? – The *Mato Oput* in Northern Uganda' (2009) 3 *Pretoria Student Law Review* 103; C Mbazira 'Prosecuting international crimes committed by the Lord Resistance Army' in Murungu & Biegon (n 37 above) 211.

111 K Clarke *Fictions of justice: The International Criminal Court and the challenge of legal pluralism in sub-Saharan Africa* (2009) 127.

112 C Rose 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth-telling and reparations' (2008) 28 *Boston College Third World Law Journa*l 345 354.

113 B Afoko 'Reconciliation and justice: "Mato oput" and the Amnesty Act' (2002) http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php (accessed 29 September 2011).

114 Uganda Coalition for the ICC 'Approaching national reconciliation in Uganda: Perspectives on applicable justice systems' (2006) *Uganda Coalition for the International Criminal Court Working Paper* 76 http://www.iccnow.org/documents/Approaching-NationalReconciliationInUganda_ 07aug13.pdf (accessed 26 September 2011).

fall within the mandate of the ICC. This could apply to children who were kidnapped from villages and forcefully recruited into the LRA.

7 Truth and reconciliation commissions and victims' rights

Some countries have adopted a policy of truth telling and, where appropriate, reconciliation commissions to confront the legacies of the past.[115] In Africa, truth commissions in various forms have been established in Nigeria, Morocco, Ghana, South Africa, Liberia, Sierra Leone, Kenya and Togo, and there are discussions underway for their establishment in Burundi, Madagascar, Sudan[116] and Uganda.[117] It can be argued that truth and reconciliation commissions may play a role in helping rebuild a society by facilitating some form of accountability, acknowledgment of crimes and roles, truth telling and reparations. It offers society the opportunity to confront its past while creating opportunities for forgiveness and reconciliation. This must, however, be done with serious caution to avoid impunity for perpetrators of human rights abuses against the defenceless and vulnerable citizens of society.

Truth commissions have generally allowed the participation of victims both as witnesses and as part of the truth-telling process. Truth commissions are generally less adversarial than courts of law and flexible in their procedures while seeking to establish the truth, which makes them a suitable vehicle for protecting the rights of victims. A quick survey of the practice of the South African and Sierra Leonean Truth Commissions in that regard is therefore useful at this juncture.

7.1 South African Truth and Reconciliation Commission

The South African Truth and Reconciliation Commission (TRC) was established by the Promotion of National Unity and Reconciliation Act of 1995.[118] While much has been written and commented upon about the successes and failures of the South African TRC,[119] the focus of this section

115 UN General Assembly Human Rights Council (n 21 above).

116 Para 320 of the Report of African Union High-Level Panel on Darfur http://www.darfurcentre.ch/images/00_DRDC_documents/Landmarks/Report_of_the_AU_High_Level_Panel_on_Darfur_English_Nov_07.pdf (accessed 27 September 2011).

117 The Uganda National Reconciliation Bill which proposes a National Reconciliation Commission with a truth-telling component is a civil society initiative.

118 The Promotion of National Unity and Reconciliation Act 35 of 1995 (TRC Act).

119 See eg R Shaw 'Rethinking truth and reconciliation commissions: Lessons from Sierra Leone' *United States Institute of Peace*, 2005; J Gibson 'The contributions of truth to reconciliation: Lessons from South Africa' (2004) 50 *Journal of Conflict Resolution* 409–432; P Hayner 'Same species, different animal: How South Africa compares to truth commissions worldwide' in C Villa-Vicencio & W Verwoerd *Looking back, reaching forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000) 34-65; G Simpson 'A brief evaluation of South Africa's Truth

is limited to a brief survey of its protection of victims' rights, especially their participation and its pronouncement on reparations.[120]

The principal object of the South African TRC was to 'promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past'.[121] To achieve its objectives, the TRC established committees on human rights violations,[122] amnesty[123] and reparations and rehabilitation.[124] The South African TRC was quite ingenious and fortunately well-resourced, which gave it some leverage and an ability to establish additional specialised units such as the investigations unit, which worked closely with victims to, among others, establish identity, receive evidence and determine violations.[125]

Relevant to victims' rights issues is the fact that the South African TRC had the power to grant amnesty, to seek and establish the truth of past atrocities during apartheid, and to recommend reparations.[126] Those who committed crimes during apartheid had to appear before the TRC's hearing for a full disclosure of the crimes and thereafter apply for amnesty. However, although the TRC recommended reparations to victims, it has been decried for the fact they were not adequate and, importantly, given the fact they were individual in nature, they did not redress the legacy of apartheid and its effects on South African society.[127] The funds available to the TRC may have determined its ability to award reparations to victims.

The South African TRC could grant urgent interim reparations to restore and rehabilitate the human and civil dignity of victims.[128] The TRC further established a President Fund[129] from which reparations to victims could be disbursed, but which to this day has yet to disburse such funds. The final reparations recommended by the South African TRC included interim reparation in monetary terms, individual reparation grants (financial and symbolic), community rehabilitation and institutional reform.[130]

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and Reconciliation Commission: Some lessons for societies' Centre for the Study of Violence and Reconciliation 1998.

120 See the Truth and Reconciliation Commission of South Africa Report, 21 March 2003 http://www.info.gov.za/otherdocs/2003/trc/ (accessed 27 September 2011).

121 Sec 2 TRC Act.

122 Sec 3(3)(a) TRC Act.

123 Sec 3(3)(b) TRC Act.

124 Sec 3(3)(c) TRC Act.

125 Sec 4(b) TRC Act.

126 Sec 3 TRC Act.

127 The government gave a final lump sum to various individuals of R6 000, a figure far less than the R23 000 that had been recommended by the TRC. M Mandani 'Amnesty or impunity? A preliminary critique of the report of the Truth and Reconciliation Commission of South Africa (TRC)' (2002) 32 *Diacritics* 33-59.

128 Sec 4(f) TRC Act.

129 Sec 42 TRC Act.

130 Final TRC Report, Volume Five, Chapter Five, paras 25-32.

7.2 Sierra Leone Truth and Reconciliation Commission

The end of the civil war in Sierra Leone was sealed by the Lomé Peace Agreement of 7 July 1999. One of the key agreements in the peace deal was the establishment of a truth and reconciliation commission. Among the principle aims and objectives of the Sierra Leone Truth and Reconciliation Commission was to address the needs of victims, which would include their rehabilitation.[131]

Against all odds, the Sierra Leone TRC sought to facilitate dialogue between perpetrators and victims.[132] One of the highlights of the Sierra Leone TRC was its unequivocal reaffirmation of the close nexus between truth telling and reparations in order to achieve societal and national reconciliation.[133] According to the Commission, both must go hand in hand and neither element can be excluded, since truth telling without reparations is devoid of its healing purpose and reparations without truth telling is akin to being offered blood money.[134]

The Sierra Leone TRC was therefore deliberate in making substantive findings on the truth and, importantly, it made recommendations for a reparations programme.[135] The reparations programme was to address the following key areas of support to victims: mental and physical health care; education; skills training; micro credit; and community and symbolic reparations.[136] The beneficiaries of the reparations programme would include the following categories of victims:[137]

- victims of sexual abuse;
- children who had suffered psychological harm, had been forcibly conscripted or lost a parent;
- war-wounded;
- amputees; and
- war widows.

The TRC further recommended the establishment of the National Commission on Social Action to co-ordinate and facilitate the implementation of the reparations programme.[138] However, the implementation of the proposed reparations in Sierra Leone is yet to start.

131 Art 6(1) of the Sierra Leone Truth and Reconciliation Commission Act, 2000; see also art XXVI of the Lome Peace Agreement of 1999.

132 Sierra Leone Truth Commission Final Report Vol 1, Chapter 3, paras 28-29.

133 Sierra Leone Truth Commission Final Report (n 132 above) para 33.

134 As above.

135 Sierra Leone Truth Commission Final Report (n 132 above) Vol II Chapter 4 Reparations.

136 Sierra Leone Truth Commission Final Report (n 132 above) Vol II, Chapter 1, para 85.

137 Sierra Leone Truth Commission Final Report (n 132 above) para 84.

138 Sierra Leone Truth Commission Final Report (n 132 above) para 87.

8 Comparable domestic legal frameworks and practices on victims' rights

For purposes of this article, it is useful to discuss, albeit briefly, some of the domestic legal frameworks and practices that include the protection to victims of crimes. Generally, within common law jurisdictions victims' rights are virtually non-existent. Victims are used to advance the prosecutor's case. Civil law traditions, led by France, are more advanced when compared to the common law systems.[139] For instance, obtaining in civil law systems, victims generally have a right to participate and to be heard as parties in the criminal justice system and, importantly, to have the right to claim civil damages in tandem with a criminal prosecution, and the right to be informed of the processes.[140]

Although the United States of America follows a common law tradition, it has nevertheless made some commendable advances with regard to victim protection and restitution. At a legislative level, these advances are reflected in the Federal Victims and Witness Protection Act of 1982,[141] the Victims of Crime Act of 1984,[142] the Victims' Rights and Restitution Act of 1990,[143] and the Victim Rights Clarification Act of 1997.[144] The objective of the legislation is to 'ensure that innocent victims of all crime have their rights upheld, have their dignity and privacy respected, and are treated with fairness'.[145] To ensure consistency and to provide clear direction of these laws, the US Attorney-General promulgated Guidelines for Victim and Witness Assistance on 9 July 1983.[146] The Guidelines stipulate the procedures and processes that government officials should follow in responding to the needs of victims and witnesses.

Relevant to the issue of reparations, the US Victims of Crime Act of 1984 establishes a Crime Victims Fund which is employed to pay restitution to victims of federal crimes in the US. The fund is maintained by fines from convicts, penalty assessments, proceeds of forfeited appearance bonds, bail bonds, and collateral collected, as well as gifts, bequests and donations from private entities.

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139 P Campbell 'A comparative study of victim compensation in France and the United States: A modest proposal' (1980) 3 *Hastings International and Comparative Law Review* 321 323.

140 As above.

141 Federal Victims and Witness Protection Act of 1982 (18 USC).

142 Victims of Crime Act of 1984.

143 Victims Rights and Restitution Act of 1990.

144 Victim Rights Clarification Act of 1997.

145 Law Enforcement Co-ordinating Committee/Victim-Witnesshttp://www.justice.gov/usao/eousa/foia_ reading_room/usam/title3/7musa.htm (accessed 29 September 2011).

146 Attorney-General Guidelines for Victim and Witness Assistance 2000 (42 USC sec 10603(c) (3)(A)). See USC S10601 Crimes Victims Fund http://www.law.cornell.edu/uscode/42/usc_ sec_42_00010601----000-.html (accessed 29 September 2011).

9 International Criminal Court and the new model of victims' rights

The Rome Statute of the ICC provides for victims' rights and a robust protection regime for victims and witnesses.[147] The Statute requires the Court to 'take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'.[148] The ICC gives attention to specific vulnerable victims such as the aged, child victims and victims of sexual and gender violence.[149] The Rome Statute establishes a Victims and Witnesses Unit (VWU) located in the Registry to provide 'protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the ICC and others who are at risk on account of testimony given by such witnesses'.[150] The Statute further provides that VWU 'shall include staff with expertise in trauma, including trauma related to crimes of sexual violence'.[151]

The Court is a permanent institution established to hold accountable those who bear the greatest responsibility for genocide,[152] crimes against humanity,[153] war crimes[154] and the crime of aggression.[155] The Rome Statute operates on a principle of complementarity which provides that it is the primary responsibility of states to hold their citi-

147 The Statute makes provision for the establishment of a Victims and Witnesses Unit by the Registrar (art 43 (6)), the protection of victims and witnesses and their participation in the proceedings (art 68) and the establishment of a Victims Trust Fund by the Assembly of State Parties (art 79).

148 See art 68(1) of the Rome Statute.

149 As above.

150 Art 43(6) Rome Statute.

151 Art 46(6) Rome Statute.

152 Art 6 of the Rome Statute provides that 'genocide' involves specific acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. W Schabas *Genocide in international law* (2000) 102–257.

153 Art 7 of the Rome Statute provides that 'crimes against humanity' involves acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. P Wald 'Genocide and crimes against humanity' (2007) 6 *Washington University Global Studies Law Review* 621.

154 Art 8 of the Rome Statute provides that the Court shall have jurisdiction in respect of war crimes, in particular when committed as part of a plan or policy or as part of the large-scale commission of such crimes. K Dormann 'War crimes under the Rome Statute of the International Criminal Court with special focus on the negotiations on the elements of crimes' in A von Bogdandy & R Wolfrum (eds) *Max Planck yearbook of United Nations law* 341.

155 Assembly of State Parties of the International Criminal Court Resolution RC/Res 6 adopted at the 13th plenary meeting on 11 June 2010 in Kampala, Uganda, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (accessed 29 September 2011).

zens accountable for international crimes.[156] It is only when states are 'unwilling and genuinely unable'[157] or there are no legitimate proceedings[158] that the ICC steps in to prosecute those responsible for these crimes to ensure that there is no impunity for mass atrocities.[159] As recognised by the ICC's strategy in relation to victims:[160]

> [A] key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but [also] a restorative function. It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims.

The ICC will enable victims to do more than only participate in the proceedings. They will have a right to present their views and observations before the Court.[161] Participation before the Court may occur at various stages of proceedings and may take different forms. For example, proceedings may be held *in camera* or the presentation of evidence may be by electronic or other means in cases of sexual violence or a child victim or witness.[162] However, it will be up to the judges to give directions as to the timing and manner of participation.[163]

Victim-based provisions within the Rome Statute[164] provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering.[165] The award of reparations to or in respect of victims, including restitution, compensation and rehabilitation, is seen as a balancing process involving retributive and restorative justice that will enable the ICC not only to

156 Art 1 Rome Statute; M Newton 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the International Criminal Law' (2001) 167 *Military Law Review* 20 26.

157 Art 17 Rome Statute; D Robinson 'The mysterious mysteriousness of complementarity' (2010) 21 *Criminal Law Forum* 67 70.

158 Office of the Prosecutor 'Paper on some policy issues before the Office of the Prosecutor' September 2003 5 http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/ 030905_Policy_Paper.pdf (accessed 20 April 2010).

159 M du Plessis 'Complementarity: A working relationship between African states and the International Criminal Court' in M du Plessis (ed) *African guide to international criminal justice* (2008) 129.

160 ICC Report of the Court on the strategy in relation to victims, ICC-ASP/8/45, 10 November 2009, Introduction, para 3; http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf. (accessed 5 April 2010).

161 S Zappala 'The rights of victims v the rights of the accused' (2010) 8 *Journal of International Criminal Justice* 137 138.

162 Art 68(2) Rome Statute.

163 E Baumgarte 'Aspects of victim participation in the proceedings of the International Criminal Court' (2008) 90 *International Review of the Red Cross* 409 415.

164 Arts 68 & 79 Rome Statute.

165 Art 75 Rome Statute.

bring criminals to justice, but also to help the victims themselves obtain justice.[166]

In furtherance of providing adequate representation for the victims participating at the trials, the ICC established the Office of Public Counsel for Victims (OPCV) in accordance with the Regulations of the Court.[167] The establishment of the OPCV, the ICC argues, is a new step in the international criminal justice system which seeks to ensure effective participation of victims in the proceedings before the Court.[168] Furthermore, the Court also believes that it is an important precedent which should enhance the system of representation for victims who, pursuant to Rule 90(1) of the Rules of Procedure and Evidence of the Court, are free to choose their legal representatives.

Another important development regarding the ICC is reparation for victims of mass atrocities. Pursuant to article 75 of the Rome Statute, the Court may lay down the principles for reparation for victims, which may include restitution, indemnification and rehabilitation. The Court must also enter an order against a convicted person stating the appropriate reparation for the victims or their beneficiaries. This reparation may also take the form of restitution, indemnification or rehabilitation. The Court may order this reparation to be paid through the Victims Trust Fund (VTF), which was set up by the Assembly of States Parties in September 2002.[169]

The Court has the option of granting individual or collective reparation, concerning a whole group of victims or a community, or both. If the Court decides to order collective reparations, it may order that reparation be made through the VTF and the reparation may then also be paid to an inter-governmental, international or national organisation.[170]

The Rome Statute also established the VTF in accordance with article 79 of the Rome Statute.[171] With the unique roles of implementing both Court-ordered and general assistance to victims of crimes under the ICC's jurisdiction, the VTF offers key advantages for promoting lasting peace, reconciliation and wellbeing in war-torn societies. That

166 ICC 'Victims and witnesses' http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims (accessed 29 September 2011); ICC 'Legal representatives of victims' http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Legal+Representation/ (accessed 29 September 2011).

167 Regulation 81 of ICC adopted by the judges of the Court on 26 May 2004 at the 5th Plenary Session, The Hague, 17-28 May 2004, http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf (accessed 29 September 2011).

168 ICC 'Office of Public Counsel for Victims' http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Office+of+Public+Counsel+for+Victims/ (accessed 29 September 2011).

169 ICC 'Reparation for victims' http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Reparation/ (accessed 29 September 2011).

170 As above.

171 Art 79 Rome Statute.

is possible through implementing Court-ordered reparation awards against a convicted person when directed by the Court to do so and general assistance using voluntary contributions from donors to provide victims and their families in situations where the Court is active, along with physical rehabilitation, material support and psychological rehabilitation, as the case may.[172]

The VTF considers its assistance to victims of sexual and/or gender-based violence (SGBV) a key step towards ending impunity for perpetrators, and establishing durable peace and reconciliation in conflict settings. The VTF is currently mainstreaming a gender-based perspective across all programming and specifically targeting the crimes of rape, enslavement, forced pregnancy, and other forms of sexual and gender-based violence.[173] The VTF benefits from the leadership and guidance of a five-member board of directors elected by the ASP for three-year terms. The five seats are distributed according to the five major world regions. Each member serves in an individual capacity on a *pro bono* basis.[174]

10 Challenges of victims' rights protection in East Africa

10.1 Legal challenges

One of the problems militating against victims' protection in the EAC is the lack of effective implementation of laws adopted to protect and promote the rights of victims.[175] There have also been some flaws in the implementation procedures of victim-based legislation in some states as political office holders are allowed to hold sensitive positions and may be influenced by the government in power.[176] Even when these laws are passed, there is also a lack of implementation as there is no sensitisation of the public regarding the provisions of the law and how

172 ICC 'Reparations and general assistance' http://www.trustfundforvictims.org/two-roles-tfv (accessed 29 September 2011).

173 As above.

174 The TFV's current board is composed of the following five members: Bulgaa Altangerel (Mongolia, representing the Asian states); Betty Kaari Murungi (Kenya, representing African states); Eduardo Pizarro Leongómez (Colombia, representing the Americas and Caribbean state); Elisabeth Rehn (Finland, representing Western European and other states); and Her Excellency Vaira V e-Freiberga (Latvia, representing Eastern European states).

175 None of the EAC countries has specific laws on victim protection including on reparations. In addition, apart from Kenya, none of the other East African countries has specific laws on witness protection which is critical for victims and witnesses participating in international criminal proceedings..

176 International Commission of Jurists 'Could Kenya's witness protection programme work' (2010) 1 *Jurist E-Bulletin* 3 http://www.icj-kenya.org/dmdocuments/newsletters/JuristIssue1.pdf (accessed 29 September 2011).

it should be implemented.[177] These have impacted negatively on victims' rights on the continent.

10.2 Cultural and religious challenges

Certain cultural and religious challenges also affect the protection of victims' rights on the continent. EAC member states, like other African countries, hold to traditional cultural and religious values.[178] Sexually-related offences have also been seen to be on the increase in situations where it is alleged that sleeping with young virgins could cure HIV/AIDS or enhance business prospects.[179] Women who are victims of domestic or sexual violence find it difficult to relate their experiences for fear of being rejected, especially where it results in HIV infection and its attendant social and public stigma.[180] Some cultures also do not allow women to say things without the consent of their husbands and this means that where a woman is willing to testify about what has happened, she may be confronted with the anger of her husband or kinsmen who object to such an open confession.[181]

10.3 Economic and social challenges

Poverty, ignorance and illiteracy, all virtually endemic in Africa, are some of the challenges seriously affecting the rights of victims.[182] Economic dislocation and attendant corruption, rife on the continent, mean that those at the lowest rung of the economic ladder continue to live in abject poverty and squalor. Most victims are ignorant of their rights and those who know have little or no means to pursue them. Additionally, bureaucracy and incessant delays have led to the loss of

177 There is currently a dossier submitted to the South African government by NGOs in relation to Zimbabwean officials accused of acts of torture in Zimbabwe but who regularly visit South Africa. The South African National Prosecutor has refused to prosecute the Zimbabwean officials on the South Africa International Criminal Court Implementation Act 2002.

178 L Igwe 'Freedom of conscience and religious persecution in Africa' statement presented at the 47th session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia on 13 May 2010, http://www.iheu.org/freedom-conscience-and-religious-persecution-africa (accessed 1 October 2011).

179 S Maoulidi 'Zanzibar GBV advocacy: Important lessons for future legal reform strategies' in D Moshenberg (ed) 'Sexual and gender-based violence in Africa' Bulletin 83 2009, http://concernedafricascholars.org/docs/Bulletin83.pdf (accessed 1 October 2011).

180 Amnesty International '"I can't afford justice": Violence against women in Uganda continues unchecked and unpunished', April 2010 http://www.amnesty.org/en/library/asset/AFR59/001/2010/en/f3688aa0-b771-464b-aa88-850bcbf5a152/afr590012010en.pdf (accessed 1 October 2011).

181 As above.

182 M Kimani 'Taking on violence against women in Africa: International norms, local activism start to alter laws, attitudes' (2007) 21 *Africa Renewal* 4 http://www.un.org/ecosocdev/ geninfo/afrec/vol21no2/212-violence-aganist-women.html (accessed 1 October 2011).

faith in the administration of justice because of corruption and public perceptions of miscarriages of justice.

11 Possible model for effective victims' rights protection in East Africa

11.1 Domestic implementation of the Rome Statute

All EAC members are parties to the Rome Statute except Rwanda. As of September 2011, there are 118 state parties to the Rome Statute of which 32 are from Africa.[183] South Africa,[184] Senegal,[185] Uganda,[186] Kenya[187] and Burkina Faso[188] are African states that have implemented the Rome Statute in their domestic legislation. Other African countries are still grappling with the process of domesticating the Rome Statute. While Kenya adopted the International Crimes Act in 2009, Uganda adopted the International Criminal Court Act in 2010 shortly before the commencement of the Review Conference that took place in Kampala.

Regarding victims' rights, the Uganda ICC Act does not provide for victims' participation in proceedings. Rather, provisions relating to victims deal with enforcement of orders for victim reparation made by the ICC.[189] Similarly, in Kenya the provision relating to 'protecting victims

183 The African countries include Benin, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Comoros Island, Congo Brazzaville, DRC, Djibouti, Gabon, The Gambia, Ghana, Guinea, Kenya, Lesotho, Madagascar, Mali, Malawi, Mauritius, Namibia, Niger, Nigeria, Senegal, Seychelles, Sierra Leone, South Africa, Tanzania, Tunisia, Uganda and Zambia. See ICC 'African states' http://www.icc-cpi.int/Menus/ASP/States+Parties/African%20States (accessed 24 September 2011).

184 See Implementation of the South African Rome Statute of the International Criminal Court Act 27 of 18 July 2002, http://www.info.gov.za/gazette/acts/2002/a27-02.pdf (accessed 24 September 2011).C Powell & F Jessberger 'Prosecuting Pinochets in South Africa' (2001) 14 *South African Journal of Criminal Justice* 344.

185 See Loi n 8 2007-02 du 12 fevrier 2007 modifiant le Code penal, in *Journal Officiel de la Republique du Senegal*, http://www.iccnow.org/documents/Loi_2007_02_du_12_Fev_2007_modifiant_le_ Code_penal_senegal_fr.pdf (accessed 24 September 2011). See M Niang 'The Senegalese legal framework for the prosecution of international crimes' (2009) 7 *Journal of International Criminal Justice* 1047.

186 The International Criminal Court Act 2010, the *Uganda Gazette* 39 Vol CIII dated 25 June 2010, assented on 25 May 2010, http://www.beyondjuba.org/policy_documents/ICC_Act.pdf (accessed 24 September 2011).

187 The International Crimes Act, 2008 http://www.coalitionfortheicc.org/documents/The_International_ Crimes_Act_2008.pdf (accessed 24 September 2011). See also A Okuta 'National legislation for prosecution of international crimes in Kenya' (2009) 7 *Journal of International Criminal Justice* 1063.

188 Decret 2009-894-PRES promulguant la loi No 052-2009-AN du 03 December 2009, http://www.iccnow.org/documents/Decret_n2009-894-PRES_promulguant_la_loi_n052-2009-AN.pdf (accessed 24 September 2011).

189 Art 64 Uganda ICC Act.

and witnesses and preserving evidence' relates to requests from the ICC.[190]

Kenya has also adopted amended legislation to protect witnesses.[191] The amended Act provides for the establishment of a Witness Protection Agency that is independent and not under the control of the Attorney-General.[192] Despite the adoption of the law and its promises, it appears that there is little or no political will to implement the provisions of the Act.[193] The participation of victims as witnesses and parties to the proceedings is not provided as obtainable before ICC trials.

This situation should be understood in the context of the common law systems found in Uganda and Kenya. These systems of law are generally characterised as adversarial and leave little or no room for victims' participation in criminal proceedings except as witnesses.[194] The ratification and domestic implementation of the Rome Statute offer states the opportunity to develop criminal justice systems that recognise the role of victims and the need for their voices to be heard.[195] Despite Africa's support for international justice and the establishment of the ICC, there is a lull in the accession and domestic implementation of the Rome Statute in Africa, probably because of the stance of the AU on the investigations of the ICC on the continent.[196]

It is encouraging that several member states of the EAC have ratified the Rome statute of the ICC.[197] However, they need to go beyond ratification. It is also important to observe that the Rome Statute has been domesticated in Kenya and Uganda. However, beyond the adoption of national laws, there is a need for enforcement mechanisms for the provisions of the law.

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190 Art 105 Kenya ICC Act.

191 See The Witness Protection (Amendment) Act, 2010 http://www.kenyalaw.org/Downloads/ammendmentacts/THE%20WITNESS%20PROTECTION%20%28AMENDMENT%29%20ACT%202010.pdf (accessed 24 September 2011). This act amended the Kenya Witness Protection Act 2006.

192 See 3A of the Witness Amendment Act 2010.

193 N Sibalukhulu 'Lack of political will undermines witness protection in Kenya' 30 March 2011, http://www.iss.co.za/iss_today.php?ID=1257 (accessed 24 September 2011).

194 A Zammit Borda 'The role of victims in the first trial of the International Criminal Court' (2010) 9 *Trinity College Dublin Journal of Postgraduate Studies* 20.

195 B Olugbuo 'Implementing the International Criminal Court Treaty in Africa The role of non-governmental organisations and government agencies in constitutional reform' in K Clarke & M Goodale (eds) *Mirrors of justice: Law and power in the post-Cold War era* (2009) 130.

196 The AU had requested the UN Security Council to defer the indictment of President Al-Bashir for one year using art 16 of the Rome Statute. The AU further passed a resolution of non-co-operation with the ICC. C Jalloh *et al* 'Assessing the African Union concerns about article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *African Journal of Legal Studies* 5 8.

197 Burundi, Kenya, Tanzania and Uganda.

The UN Victims Handbook has provided a starting point for states in developing synergies of co-operation in protecting the rights of victims. International and regional treaties protecting victims will have an impact on local populations if governments go beyond the enactment of victim and witness protection laws and participation in criminal justice processes. There must be political will for implementation at the local level. Any victims' assistance programme should be aimed at dealing with emotional trauma, participating in the criminal justice process, obtaining reparations and coping with problems associated with victimisation.[198]

National initiatives to assist victims should meet international standards and norms that provide social, psychological, emotional and financial support, and effectively help victims within the criminal justice and social institutions.[199] EAC member states should show commitment in dealing with the plight of victims to reduce their suffering. The cessation of hostilities should be of paramount concern to government agencies and the international community. Those who bear responsibility for international crimes should be held accountable. This is to ensure that there is no impunity for perpetrators.[200]

It is necessary to expand the victims' opportunities to participate in all critical stages of the criminal justice process and to ensure consideration of the impact of the victimisation upon the victim in all criminal justice systems and international tribunals. To this end, victims should voluntarily elect to participate in proceedings and adequate security should be provided.

An increase in co-ordination and networking of all agencies, organisations, groups and families, and kinship and community support systems providing services to victims or affecting the treatment of victims is encouraged. This will help develop an integrated system of victim assistance.[201] EAC member states should be willing to partner with non-governmental and intergovernmental agencies to ensure the effective promotion and protection of the rights of the victims.

The improvement of the quality of outreach programmes for victims and victims' treatment should be paramount. Most victims are neglected by the criminal justice system and at times are only used as pawns to secure the conviction of accused persons without efforts to ensure that the rights and privileges of the victims are not abused.[202] This should not be the case and victims should be accorded every respect during the criminal justice process and should be allowed to participate in all the stages of trials.

198 *UN victims handbook* (n 48 above) 11.

199 *UN victims handbook* iv.

200 *UN victims handbook* 11.

201 As above.

202 As above.

11.2 Victim reparations in domestic legal systems

A good model for victim rights protection in the EAC should provide for a Victims Reparations Fund (VRF). The United States of America Crimes Victims' Rights Act of 1984,[203] discussed earlier, provides a comparable framework for setting up such a fund.[204] The GLP that is applicable to EAC member states will be helpful regarding the specific circumstances of each member state. The proposed VRF should award compensation, reparation and restitution on the basis of the awards and recommendations of adjudicating courts.

Immediate reparation or compensation to victims should be considered and there is no need to wait for the conclusion of cases before this can occur. The support and assistance deemed necessary to restore the dignity of victims and attend to their urgent medical and related needs, such as transportation costs for participation in judicial proceedings, emergency accommodation, crisis intervention, and other services necessary to effectively respond to emergency needs of victims, should be of the utmost concern to governments.

The law establishing the fund should provide for the seizure of assets of convicted persons and this should be used to compensate victims. Alternative provisions should be made to enhance victims' rights and their ability to lodge civil proceedings alongside criminal proceedings against a convicted person for damages for injury and loss suffered as a result of the victimisation.

The practice of the civil law jurisdictions and the Extraordinary Chambers in the Courts of Cambodia, discussed earlier, should be examined further for lessons and best practices.[205] The proposed VRF should receive contributions from the general public and donors who may want to help in the rehabilitation of victims of sexual violence and international crimes. The United States of America's model of financing the fund through fines, penalties and confiscated proceeds of crime may be considered as sources of income.

12 Conclusion

Enhancing the protection of the rights of victims should be a priority of EAC member states. At the international level, the ICC presents unique opportunities since at the moment all its cases are from Africa. For EAC member states, the GLP and its Protocols offer good tools

203 Crime Victims' Rights Act of 1984 (42 USC 10601) http://www.law.cornell.edu/uscode/42/usc_sup_01_42_10_112.html (accessed 29 September 2011).

204 n 204 above, sec 10601.

205 International Bar Association 'Safeguarding judicial independence in mixed tribunals: Lessons from the ECCC and best practices for the future' September 2011, http://www.cambodiatribunal.org/sites/default/files/reports/Cambodia%20report%20(Sept%202011).pdf (accessed 1 October 2011).

for protecting the rights of victims. These instruments need domestic implementation to have the force of law. Political will to bring about the needed changes is necessary.[206]

It should be reiterated that the ICC will only try those who bear the greatest responsibility for war crimes, crimes against humanity and genocide.[207] The bulk of the trials for international crimes will be conducted by national judicial systems. It is therefore necessary for EAC member states to have procedures in their judicial systems to complement the work of the ICC.[208]

It also important that those who have ratified the Rome Statute but are yet to implement it should do so as a matter of urgency, bearing in mind the need to bring the provisions of the criminal justice legislation in consonance with emerging trends in international criminal justice.[209]

For Uganda and Kenya, there are laws that are in place that could be helpful in this regard. Burundi should increase its pace in setting up a truth and reconciliation commission and a special tribunal to ensure that there is no impunity for those accused of international crimes.[210] The Rwandese government should accede to the Rome Statute and should have effective national legislation to provide for the rights of victims. Tanzania should implement the Rome Statute in its domestic law and also develop victims' rights protection mechanisms.

206 T Mnuh 'Women in Africa's development: Overcoming obstacles, pushing for progress' (2008) 11 *Africa Recovery Briefing Paper*, http://www.un.org/ecosocdev/geninfo/afrec/bpaper/maineng.htm (accessed 1 October 2011).

207 L Moreno-Ocampo 'Keynote address: Integrating the work of the ICC into local justice initiatives' (2006) 21 *American University International Law Review* 497 503.

208 Citizens For Global Solutions 'In uncharted waters: Seeking justice before the atrocities have ended: The International Criminal Court in Uganda and the Democratic Republic of the Congo' June 2004 11 http://archive1.globalsolutions.org/programs/law_justice/icc/resources/uncharted_waters.pdf (accessed 1 October 2011).

209 B Olugbuo 'Implementation of the Rome Statute of the International Criminal Court in Africa: An analysis of the South African legislation' (2004) 1 *Eyes on ICC* 191 203.

210 A Triponel & S Pearson 'What do you think should happen? Public perception in transitional justice' (2010) 22 *Pace International Law Review* 103 105.

AFRICAN HUMAN RIGHTS LAW JOURNAL

The right to economic empowerment of persons with disabilities in Nigeria: How enabled?

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Summary

In many societies, including Nigeria, persons with disabilities (PWDs) are extremely poor and disadvantaged. Economic empowerment is an effective means through which PWDs can fend for themselves and reduce poverty. The article focuses on the right of PWDs in Nigeria to economic empowerment. It argues that PWDs in Nigeria lack the opportunity to economically empower themselves, especially in relation to the Nigerians with Disability Act 1993. It also suggests ways through which PWDs can attain economic empowerment.

1 Introduction

Persons with disabilities (PWDs) are amongst the most economically-disadvantaged in any society in the world. Recent studies indicate that about one in ten persons in the world lives with a disability and that PWDs constitute up to 20 per cent of the population living in poverty in developing countries.[1] This number is continually on the increase because of factors such as war, unhealthy living conditions and a lim-

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1 International Day of Persons with Disabilities, 3 December 2009 'Making the Millennium Development Goals (MDGs) disability-inclusive: Empowerment of PWDs and their communities around the world' http://www.un.org/disabilities/default.asp?id=1484 (accessed 10 October 2010).

ited knowledge of disability, its causes, prevention and treatment.[2] PWDs usually lack the opportunity to be educated or rehabilitated and are usually denied equal employment opportunities. They are excluded from society and live in abject poverty as they lack the means or are not afforded the opportunity to fend for themselves. Consequently there is a strong correlation between disability and poverty in most societies.[3] In fact, even though access to public social services, such as employment, education, transport and housing, is generally better for PWDs in developed countries than it is in developing countries, there is no single nation in the world where the disabled community has reached an equal-opportunity status with their non-disabled counterparts.[4]

The condition of PWDs in Nigeria is no different from those in other developing countries. The World Health Organisation (WHO) estimates that the number of PWDs in Nigeria is about 19 million, approximately 20 per cent of the country's total population.[5] Most of the PWDs in Nigeria continually face barriers to their participation in society and are often marginalised. They are often afforded little or no opportunities to express themselves and to contribute to their development or that of their families, communities and nation. More often than not, they are regarded as people to be pitied rather than as people who can contribute to the development of Nigeria. As such, they face stigma and discrimination and lack access to opportunities guaranteed by law, such as education, rehabilitation, employment, and the like. Even when they have been educated or rehabilitated and meet the necessary requirements for employment, they are often denied employment because of their disability. Consequently, they have to depend on family members, well-wishers and charity groups for assistance to sustain themselves as they have no source of income for their livelihood.[6] Their situation is dire because the opportunities for them to emerge from poverty are limited, in many cases by the lack of enabling legislation to promote their access to skills development and employment opportunities or by weak implementation and enforcement measures,

2 R Lang & L Upah *Scoping study: Disability issues in Nigeria* (2008) http://www.ucl.ac.uk/lc-ccr/downloads/scopingstudies/dfid_nigeriareport (accessed 15 March 2010).

3 CBR 'A strategy for rehabilitation, equalisation of opportunities, poverty reduction and social inclusion of people with disabilities' joint position paper 2004 http://unesdoc.unesco.org/images/ 0013/001377/137716e.pdf (accessed 15 June 2010). See also South Africa's Integrated National Disability Strategy, http://www.independentliving.org/docs5/SANatIDisStrat.html (accessed 10 October 2010).

4 WP Khupe 'Disabled people's rights. Where does Zimbabwe stand?' http://www.thezimbabwean.co.uk/index.php?option=com_content&view=article&id=29988:disabled-peoples-rights-where-does-zimbabwe-stand&catid=52&Itemid=32 (accessed 11 January 2011).

5 As above.

6 'Disability in Africa' http://www.ascleiden.nl/Library/Webdossiers/DisabilityInAfrica.aspx (accessed 16 March 2010).

where such legislation is in place.[7] The Nigerians with Disability Act 1993 (NWDA) is the only specific legislation dealing with disability rights in Nigeria.[8] Although its provisions appear satisfactory, not much has been done with regard to the implementation and enforcement of the Act. Indeed, many people, including PWDs, are not aware of its existence. There is therefore a general disregard of disability rights in Nigeria.

The article examines the right to economic empowerment of PWDs in Nigeria. It focuses on empowerment through education; employment, vocational rehabilitation, the provision of financial resources or services and reasonable accommodation as provided for by the Convention on the Rights of Persons with Disabilities (CRPD)[9] to which Nigeria is a party. It assesses the provisions of the NWDA in empowering PWDs in Nigeria in terms of the standards laid down in the CRPD.

2 Who qualifies as a person with a disability?

The definition of disability is a very contentious issue within disability discourse. As a result of this, proffering an acceptable definition of 'disability' could be problematic. Indeed, the CRPD acknowledges that 'disability is an evolving concept'[10] and so does not explicitly define disability but merely elucidates who a PWD is. According to the Convention, 'persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.[11] This explanation of PWDs reflects the social model of disability in which disability is perceived as a complex collection of conditions, many of which are created by the social environment rather than an attribute of the individual.[12] It

7 ILO Fact Sheet 'Promoting the employability and employment of people with disabilities through effective legislation (PEPDEL)' http://www.ilo.org/asia/whatwedo/publications/lang--en/docName--WCMS_106597/index.htm (accessed 20 November 2011).

8 The Nigerians with Disability Act 1993 (NWDA). The NWDA was originally a decree, the Nigerians with Disability Decree 1993, which was promulgated by the military head of state (General Sanni Abacha) in January 1993. By virtue of sec 315 of the 1999 Constitution, the NWDA, like other existing federal decrees, became an Act. It has not been repealed by any law and is still in force, despite its forgotten status.

9 Art 1 Convention on the Rights of Persons with Disabilities (CRPD) http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf (accessed 20 April 2010).

10 Preamble para (e) CRPD (n 9 above).

11 CRPD (n 9 above) art 1.

12 D Mont 'Measuring disability prevalence' (March 2007) Discussion paper 0706 http://siteresources.worldbank.org/DISABILITY/Resources/Data/MontPrevalence.pdf (accessed 14 October 2011).

acknowledges that disability resides in society and not in the person.[13] For instance, a person in a wheelchair might have difficulties being gainfully employed, not because of his or her condition, but because there are environmental barriers, such as inaccessible buses or staircases in the workplace, that impede his or her access to employment.[14] This view marks a 'paradigm shift' in attitudes and approaches where PWDs are viewed as capable members of society and not as objects of charity, medical treatment and social protection.[15] Thus, the CRPD recognises that disability is not just a medical condition, but also the product of the interaction between the environment and the health condition of particular persons.[16] In other words, it acknowledges that disability results from an interaction between a non-inclusive society and individuals.[17] This is significant because prior to the clarification provided by the CRPD, disability was defined according to the medical model and was seen as a physical, mental or psychological condition that limits a person's ability to function properly.

Clearly, the CRPD does not impose a rigid view of 'disability' but rather assumes a dynamic approach that allows for adaptations over time and within different socio-economic settings.[18] Thus, its recognition that 'disability' is an evolving concept acknowledges the fact that society and opinions within society are not static.[19] It therefore reflects a flexible approach to PWDs in that it does not focus on the condition of the individual, but emphasises the significant impact that attitudinal and environmental barriers in society may have on the enjoyment of the human rights of PWDs.[20]

The Nigerian perspective on disability is based on the medical model of disability. The NWDA defines a 'disabled person' as a person who has[21]

> a condition which is expected to continue permanently or for a considerable length of time which can reasonably be expected to limit the person's functional ability substantially, but not limited to seeing, hearing, thinking, ambulating, climbing, descending, lifting, grasping, rising, any related func-

13 'From exclusion to equality – Realising the rights of persons with disabilities' *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol 14 of 2007* 4.

14 *Handbook for Parliamentarians* (n 13 above) 13.

15 'Convention on the Rights of Persons with Disabilities and its Optional Protocol' (CRPD Basics) http://www.un.org/disabilities/documents/ppt/crpdbasics.ppt (accessed 9 October 2011).

16 'A new financial access frontier: People with disabilities – A concept paper from the Centre for Financial Inclusion at ACCION International' June 2010 http://www.accion.org/document.doc?id=830 (accessed 7 November 2010).

17 CRPD Basics (n 15) above.

18 *Handbook for Parliamentarians* (n 13 above) 13.

19 As above.

20 As above.

21 NWDA (n 8 above) sec 3.

> tion or any limitation due to weakness or significantly decreased endurance so that he cannot perform his everyday routine, living and working without significantly increased hardship and vulnerability to everyday obstacles and hazards.

This perspective is limited as it does not reflect the contemporary social approach to disability reflected in the CRPD. It is therefore suggested that the NWDA, which predates the CRPD, be amended to reflect the contemporary trend.

3 What economic empowerment of PWDs entails

Empowerment is 'an ongoing process' which enables an individual to fulfil and be accountable for his or her duties and responsibilities and protect his or her rights in society.[22] It is the process through which PWDs can develop the skills to take control of all aspects of their lives and their environment and includes confidence building, insight and the development of personal skills.[23] It therefore involves providing people with the resources, opportunities, knowledge and skills needed to increase their capacity to determine their own future and fully participate in community life.[24]

The empowerment of PWDs is vital to enable them to take their place in the wider society.[25] It therefore involves affording them a variety of opportunities to discover themselves, understand their environment, be aware of their rights, take control of their lives and partake in important decisions that lead to their destiny.[26] It also involves providing them with the resources, prospects, knowledge and skills to fend for themselves and to be an integral part of their society. Thus, the economic empowerment of PWDs involves ensuring that they are given the opportunity to earn a living to sustain themselves. It involves addressing employment issues as well as other issues that amplify the cycle of disability, poverty and the exclusion of PWDs.[27] In other words, like every other person, PWDs must be regarded as equal before the law[28] and must be

22 E Helander *Prejudice and dignity: An introduction to community-based rehabilitation (*1993).

23 'The meaning of empowerment' http://www.powerfulinformation.org/page.cfm?pageid=pi-empowerment (accessed 30 April 2010).

24 Helander (n 22 above).

25 'People with disabilities: Pathways to decent work' Report of a tripartite workshop organised by the ILO Skills and Employability Department in Lusaka, Zambia, 9-10 May 2006 http://www.ilo.org/skills/pubs/WCMS_107788/lang--en/index.htm (accessed 13 October 2010).

26 DV Tsengu *et al* 'CBR and economic empowerment of persons with disabilities' http://www.asksource.info/cbr-book/cbraspart_04.pdf (accessed 16 March 2010).

27 'Economic empowerment' http://www.handicap-international.org.uk/page_244.php (accessed 30 April 2010).

28 CRPD (n 9 above) art 12. See also Universal Declaration of Human Rights (1948) GA Res 217A (III), UN Doc A/810 71.

given equal chances and opportunities to better themselves through employment, education, and such without discrimination.[29]

The CRPD promotes the empowerment of PWDS by addressing disability issues in a human rights context and by linking disability issues to economic, social, civil, political and cultural rights.[30] It is based on the principles that PWDs have a right to equal opportunity, a right not to be discriminated against as well as a right to be allowed to fully and effectively participate and be included in society.[31] It recognises that all persons are equal before and under the law and are entitled, without any discrimination, to the equal protection and equal benefit of the law.[32] It also calls for the prohibition of all discrimination on the basis of disability and the guarantee that PWDs be accorded equal and effective legal protection against discrimination.[33] It further requires that appropriate steps are taken to ensure that reasonable accommodation is provided so as to promote equality and eliminate discrimination.[34] It defines 'reasonable accommodation' as[35]

> necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

It sees the denial of reasonable accommodation as a form of discrimination on the basis of disability.[36] It additionally advocates the empowerment of PWDs by calling for the elimination of all barriers to their living independently and participating fully in all aspects of life by ensuring their access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communication technologies and systems, and to other facilities and services open or provided to the public.[37]

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29 'Equal opportunity' http://www.encyclopedia.com/topic/Equal_Opportunity.aspx (accessed 14 October 2011).

30 ICRPD – Implementation Tool Kit http://www.icrpd.net/implementation/en/toolkit/section1.htm (accessed 12 October 2011).

31 CRPD (n 9 above) art 3.

32 Art 5(1) CRPD (n 9 above).

33 Art 5(2) CRPD (n 9 above).

34 Art 5(3) CRPD (n 9 above).

35 Art 2 CRPD (n 9 above).

36 As above. Art 2 of the CRPD defines discrimination on the basis of disability as 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.'

37 Art 9 CRPD (n 9 above).

However, regardless of the provisions of the CRPD, many PWDs are not afforded the opportunity to empower themselves.[38] It has therefore become necessary for PWDs to be given the means to survive and take advantage of the opportunities which the twenty-first century has to offer and empower themselves economically without discrimination.[39] As such, all barriers, be they financial, economic, political, social or psychological, which hinder PWDs from being accorded equal opportunities should be eliminated.[40] This can be achieved through education, employment, vocational rehabilitation and the provision of financial resources/services.

3.1 Education

Education is an effective tool for the economic empowerment of PWDs and it entails equal opportunity without discrimination. It is the primary means by which disadvantaged people can lift themselves out of poverty and participate fully in their community. It gives independence, a sense of self-worth, citizenship rights, employment and economic power.[41] The right to education entails ensuring that equipment and teaching materials match needs and that teaching methods and curricula suit the needs of all children and promote the acceptance of diversity.[42] So, empowerment is inextricably linked to education as education is a crucial part of all empowerment programmes.[43] The education of PWDs could be formal (involving the provision of an inclusive educational system from nursery/kindergarten school to tertiary institutions) or informal (involving the establishment of special and vocational training schools). Through formal and informal educational programmes, PWDs can gain knowledge and skills needed to perform functions and tasks or carry out some socio-economic activities for personal and community development.[44] Empowerment through education cannot be achieved only through the education and training of PWDs; it is also important to train the teachers and professionals that work with them.[45] Curricula for the special and vocational training schools should

38 International Convention on the Rights of Persons with Disabilities – Some facts about persons with disabilities http://www.un.org:80/disabilities/convention/pdfs/factsheet.pdf (accessed 9 October 2011).

39 L Frieden 'Perspectives on the status of people with disabilities internationally' http://home.comcast.net/~lfrieden/lfriedenperspectives0603.htm (accessed 30 April 2010).

40 World Conference on Human Rights (June 1993) – Vienna Declaration and Programme of Action (1993) 32 *International Legal Materials* 1661 art 64.

41 Right to education – What does this mean for us?' http://www.hrc.co.nz/newsletters/manahau/2010/03/right-to-education-%E2%80%93-what-does-this-mean-for-us/ (accessed 6 May 2010).

42 As above.

43 n 27 above.

44 Art 24(1) CRPD (n 9 above).

45 As above.

also take into account the activities that prepare PWDs for an effective transition from school to working life.[46]

The right of PWDs to education is a fundamental right which is enshrined in the CRPD. The CRPD recognised the need for the provision of an inclusive education system at all levels and for lifelong learning directed at ensuring that PWDS reach their fullest potential and enabling them to participate effectively in a free society.[47] In realising the right to education, it enjoins that state parties ensure, amongst other things, that PWDs are not excluded from the general education system on the basis of disability; that access to inclusive, qualitative and free primary education and secondary education is available on an equal basis; that reasonable accommodation of the individual's requirements is provided; and the receipt of the support required, within the general education system, to facilitate their effective education.[48] It also enjoins state parties to take appropriate measures to ensure that PWDs fully and equally participate in education by facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, sign language and the promotion of the linguistic identity of the deaf community, and so on.[49] It also advocates the employment of teachers, including teachers with disabilities, with adequate training to educate PWDs at all levels of education.[50]

Some African countries have recognised the need for educating PWDs and have taken steps to provide and to adopt policies on the education of PWDs. For instance, in Kenya, the Ministry of Education has adopted an integration policy which would allow children with disabilities to be placed in normal schools.[51] South Africa has also drafted a policy on inclusive education.[52]

3.2 Employment

PWDs have the right to be given an equal opportunity to seek employment. They have a right to obtain decent work – that is, productive work in which their rights are protected, which generates an adequate

46 Tsengu *et al* (n 26 above).

47 Art 24(1) CRPD (n 9 above).

48 Art 24(2) CRPD (n 9 above).

49 Art 24(3) CRPD (n 9 above).

50 Art 24(4) CRPD (n 9 above).

51 'Kenya Country Profile of March 2004 – Employment of people with disabilities: The impact of legislation' prepared by ILO InFocus Programme on Skills, Knowledge and Employability in the framework of a project funded by Development Co-operation Ireland (DCI) http://www.ilo.org/wcmsp5/groups/public/-ed_emp/-ifp_skills/documents/publication/wcms_ 107837.pdf (accessed 20 November 2010).

52 See South Africa's White Paper on Special Needs Education of 2001 http://www.info.gov.za/whitepapers/2001/educ6.pdf (accessed 20 November 2010).

income, with adequate social protection.[53] This is because employment is instrumental for their self-esteem, economic and social integration within the family, the community and society.[54] PWDs can demonstrate their ability and contribute equally alongside fellow workers if employers remove unfair discriminatory barriers to their employment and make reasonable accommodation for their needs.[55] As such, employers, including the government, should be willing to give PWDs an opportunity to prove their capability and earn a living by ensuring that jobs are available to them. Employers should also afford them the opportunity to hold leadership positions to enable them to use their initiative in handling responsibilities and also allow them to join labour unions to enable them to express their views on problems and issues affecting their lives.[56]

The 1993 United Nations (UN) Standard Rules on Equal Opportunities for Persons with Disabilities acknowledges that PWDs must be empowered to exercise their human rights, particularly in the field of employment, and must have equal opportunities for productive and gainful employment in the labour market.[57] As such, the integration of persons with disabilities into open employment must be actively supported.[58] This right of employment as stated by the CRPD includes the right to gain a living through work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.[59] It enjoins state parties to safeguard and promote the realisation of the right to work, by taking appropriate steps, including legislation to, *inter alia*, prohibit discrimination on the basis of disability with regard to all matters concerning employment; protect the rights of PWDs on an equal basis, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances; ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others; promote opportunities for self-employment, entrepreneurship and the development of co-operatives and businesses; and employ

53 n 25 above.

54 'Good practices for the economic inclusion of people with disabilities in developing countries – Funding mechanisms for self-employment' August 2006 http://www.handicap-international.fr/bibliographie-handicap/7Donnees/RapportEtude/GoodPracticesEcoInclusion.pdf (accessed 3 November 2010)

55 South Africa's Draft Code of Good Practice on Disability in the Workplace http://www.labour.gov.za/legislation/codes-of-good-ractise/employment-equity/code-of-good-practice-on-disability-in-the-workplace (accessed 05 January 2011).

56 Tsengu *et al* (n 26 above).

57 Rule 7 United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities http://www.un.org/esa/socdev/enable/dissre00.htm (accessed 9 October 2011).

58 As above.

59 Art 27(1) CRPD (n 9 above).

persons with disabilities in the public and private sectors.[60] It provides that reasonable accommodation should be provided to PWDs in the workplace so as to promote their right to work.[61] It also calls for the protection of PWDs from slavery, servitude and forced or compulsory labour in the course of their employment.[62]

3.3 Vocational rehabilitation

Vocational rehabilitation refers to a continuous and co-ordinated process of rehabilitation which involves the provision of vocational services such as vocational guidance, vocational training and selective placement that are designed to enable a PWD to secure and retain suitable employment.[63] It is a means through which PWDs can be reintroduced into society to function socially and economically according to their capability. It entails the transfer of power and control over their lives from external entities to the individuals themselves and is based on individual needs and is meant to prepare PWDs to achieve a lifestyle of independence and integration within their workplace, family and local community.[64] The purpose of vocational rehabilitation is to enable a disabled person to secure, retain and advance in suitable employment and thereby to further such a person's integration or reintegration into society.[65] It includes education; training; vocational guidance and counselling; and rehabilitation services such as medical, psychiatric, social and psychological assessments, vocational assessment and restoration, job preparation and placement and assistive technological services.[66]

Vocational rehabilitation could either be community-based or institutional-based. Community-based rehabilitation involves meeting the needs of PWDs through the combined efforts of the PWDs, their families and their communities. On the other hand, institutional-based

60 As above.

61 As above.

62 Art 27(2) CRPD (n 9 above).

63 South Africa's Integrated National Disability Strategy – A White Paper, Appendix B http://www.info.gov.za/whitepapers/1997/disability.htm (accessed 20 September 2010).

64 JF Kosciulek 'Empowering people with disabilities through vocational rehabilitation counselling' (2004) *American Rehabilitation*; see also 'Vocational rehabilitation' http://www.minddisorders.com/Py-Z/Vocational-rehabilitation.html (accessed 20 September 2010).

65 ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention No 159 1983 Part I, art 1(1) http://www.ilo.org/ilolex/cgi-lex/convde.pl?C159 (accessed 20 November 2011).

66 B Dupes 'Vocational rehabilitation: Helping people with disabilities in jobs and careers' http://www.amputee-coalition.org/easyread/first_step_2005/voc_rehab-ez.pdf (accessed 20 September 2010).

rehabilitation is rehabilitation of PWDs at or through institutions, often away from their homes.[67]

The right of PWDs to vocational rehabilitation is well articulated in the International Labour Organisation (ILO) Vocational Rehabilitation and Employment (Disabled Persons) Convention 159 of 1983,[68] and the ILO Vocational Rehabilitation and Employment Recommendation 168 of 1983.[69] ILO Convention 159 provides that member parties should have a policy aimed at ensuring that appropriate vocational rehabilitation measures are made available to all categories of PWDs.[70] The competent authorities shall take measures with a view to providing and evaluating vocational guidance and vocational training.[71] ILO Recommendation 168 recommends that, in providing vocational rehabilitation and employment assistance to disabled persons, the principle of equality of opportunity and treatment for men and women workers should be respected.

3.4 Provision of financial services/resources

Financial services are products, facilities and services including savings, credit, insurance, transfers, payment services, leasing, and such which are provided by banks, credit unions and financial institutions, government and non-governmental organisations (NGOs).[72] It is indisputable that financial service providers have largely failed in providing services that include PWDs.

Microfinance is the best way to address the financial needs of persons with disabilities because it lacks the usual difficulties involved in accessing other financial products such as the provision of security.[73] It also has features like doorstep delivery and product flexibility such as access to rental services for machines or equipment or lease services to ensure that PWDs are not sidelined.[74] In the 1970s, microfinance was instrumental in the dramatic shift from seeing the poor as unbankable and the provision of financial services to them as a losing proposition and business folly. This is because not only did the poor prove bank-

67 R Arora 'National programme for rehabilitation of persons with disabilities – A blend of CBR and IBR' http://www.aifo.it/english/resources/online/apdrj/frimeet202/national.doc (accessed 10 October 2010).

68 ILO Convention 159 (n 65 above).

69 ILO Vocational Rehabilitation and Employment Recommendation 168 http://www.ilo.org/ilolex/cgi-lex/convde.pl?R168 (accessed 20 September 2011).

70 ILO Convention 159 (n 65 above) arts 2 & 3.

71 Art 7 ILO Convention 159 (n 65 above).

72 South Africa's Draft Code of Good Practice on Disability in the Workplace (n 55 above). See also 'Financial services' http://www.businessdictionary.com/definition/financial-services.html (accessed 10 October 2010).

73 Microfinance involves the provision of financial services to low-income clients and those who have been traditionally excluded.

74 South Africa's Draft Code of Good Practice on Disability in the Workplace (n 55 above).

able, but they were bankable in a sustainable and profitable way.[75] The provision of financial services to PWDs in the twenty-first century also faces similar scepticism, some of it based on real service delivery challenges and some rooted in misperception.[76]

PWDs ought to be given access to financial services/resources to assist them to become self-reliant and to realise their socio-economic needs such as education, self-employment, social security, and such. This right of PWDs to financial services should be facilitated as it could be a means of empowering them and achieving the Millennium Development Goals (MDG) goal of reducing poverty by 2015. Indeed, the CRPD recognises PWDs' right to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit.[77]

Nevertheless, they are not given access to financial services because of the belief that they are unbankable and providing them financial services is not cost-effective.[78] The provision of financial resources and services to PWDs is important as not all of them can be educated, trained, rehabilitated or employed by the public and private sectors. So they ought to be provided with financial services to be able to cater for themselves. Hence, PWDs that have successfully completed their education or vocational training/rehabilitation but are yet to secure wage-earning jobs should be given access to financial services, especially microfinance, to enable them set up workshops or suitable income-generating activities in order to earn a living. PWDs should also be provided with the financial resources to facilitate their education as most of them are too poor to afford the expenses related to education. In view of this, financial aid/services in the form of bursaries, grants, scholarships, small loans or student loans could also be granted to them to assist them in their educational needs.

4 How enabled is the right to economic empowerment of persons with disabilities in Nigeria?

The Nigerian Constitution[79] and the NWDA[80] guarantee equal treatment, equal rights, privileges, obligations and opportunities before

75 J Goldstein 'Making international microfinance institutions disability inclusive: A call to action' http://wid.org/employment-and-economic-equity/access-to-assets/equity/equity-e-newsletter-november-2010/feature/ (accessed 5 January 2011); see also M Romeu 'A call to action: Making international MFIs disability-inclusive' http://centerforfinancialinclusionblog.wordpress.com/ 2010/11/05/a-call-to-action-making-international-mfis-disability-inclusive/ (accessed 5 January 2011).

76 As above.

77 Art 12(5) CRPD (n 9 above).

78 V Ratnala 'They are bankable: Reaching out to people with disabilities' http://www.microfinancefocus.com/liveblog/2009/09/11/they-are-bankable-reaching-out-to-people-with-disabilities/ (accessed 5 January 2011).

79 Sec 17 Constitution of the Federal Republic of Nigeria, 1999 Cap C 34, LFN 2004.

80 Secs 2(1) & (2)(b) NWDA.

the law. They provide that PWDs should be treated as equals to other Nigerians for all purposes. These provisions ought to facilitate PWDs in attaining economic empowerment, but in reality this is not the case. They are usually not given equal opportunities before the law and so lack the opportunity to actualise themselves. Unfortunately, education, rehabilitation and employment are still inconceivable by most PWDs in Nigeria. More so, the absence of implementation and enforcement of the above-mentioned laws is a hindrance to the economic empowerment of PWDs. Thus, the one factor that still separates PWDs in Nigeria from the rest of society is economic equality because of PWDs' ignorance of their rights and privileges. The right of PWDs to education, employment, vocational rehabilitation and financial resources/services is examined below.

4.1 Education

Although education is also one of the objectives of the Nigerian government at the state and federal levels and the Nigerian Constitution contains provisions for equal and adequate educational opportunities at all levels, not much has been done with regard to educating PWDs.[81] This is mainly because educational provisions are contained in chapter II of the Constitution which deals with the Fundamental Objectives and Directive Principles of State Policy and are non-justiciable. By virtue of section 6(6)(c) of the 1999 Constitution, the authority of the judiciary does not extend to any issue or question relating to the Fundamental Objectives and Directive Principles of State Policy. So, the Nigerian government cannot be compelled to carry out the duties in the Constitution and the only way of enforcing these provisions is through judicial activism.

The NWDA states that the government and relevant authorities must ensure equal and adequate education as well as provide free education in public institutions at all levels for PWDs in Nigeria.[82] In addition, it provides for the training of personnel to cater for the educational development of PWDs and the vocational training of PWDs.[83] It also provides for the establishment of special schools with appropriate curricula for the different disability conditions and the improvement of university education facilities for the maximum benefit of PWDs.[84] The Act further provides for the establishment of a National Institute of Special Education[85] and that government must ensure that not less

81 Sec 18 & Second Schedule, Part II 1999 Constitution.

82 Secs 2(2)(c) & 5(1) NWDA.

83 Sec 5(2) NWDA.

84 Secs 5(4)(1) & (2) NWDA.

85 As above.

than 10 per cent of all educational expenditure is committed to the educational needs of PWDs at all levels.[86]

In spite of these provisions, the rate of education for PWDs in Nigeria is very low and the degree of illiteracy for PWDs is much higher than that of the general population. Although there is a lack of data on the rate of education of PWDs in Nigeria, a survey carried out by UNICEF shows that as at 1993, there were 1,51 million children with disabilities and only about 284 special schools in the country. It was also reported that only 4,23 per cent of the children were enrolled in formal schools, suggesting that about 95 per cent had no access to formal education.[87] Education for PWDs is not free at any level and there are few available trained personnel. Special schools in Nigeria that cater for the different disability conditions are few and inadequate. Also, only a few schools in Nigeria offer special education and training in vocational skills for PWDs and more often than not, they lack the appropriate curricula to provide for the special needs of PWDs. Besides, not much has been done by the government with regard to policy making and implementation to guarantee the education of PWDs. It is doubtful if 10 per cent of all educational expenditure is spent on catering for the educational needs of PWDs. While the government states that it is committed to providing free education for PWDS, it has failed to provide the manpower, resources and equipment for that purpose. In fact, educational policies and programmes are made and educational expenditure is spent without taking into consideration the special needs of PWDs. Thus, the education of PWDs in Nigeria needs to be given greater consideration than it is given now and subsequent policies should take into account the different disability conditions.

4.2 Employment

The Nigerian Constitution also provides that all citizens should have the opportunity to secure an adequate means of livelihood and suitable employment without discrimination of any group.[88] However, these provisions are also non-justiciable as they are contained in chapter II of the Constitution and the authority of the judiciary does not extend to any issue or question relating to it.

The NWDA provides for government to take measures to promote the employment of PWDs.[89] It also provides that at least 10 per cent of all fund allocations to training and personnel development must be reserved by employers of PWDs. No PWD should be subjected to

86 Sec 5(4)(2) NWDA.

87 UNICEF Nigeria *Children's and women's rights in Nigeria: Renewing the call – Situation assessment and analysis* (2007).

88 Sec 17(3)(a) 1999 Constitution.

89 Sec 6(2) NWDA.

discrimination by an employer because of his or her disability.[90] The Act further provides that private employers who employ PWDs must be entitled to a tax deduction of 15 per cent of all payable tax upon proof to the Internal Revenue Department.[91]

However, PWDs are especially vulnerable to discrimination and disadvantage in employment in Nigeria. They often experience unequal employment opportunities, limited rights to work and reduced job security.[92] Even when they are well educated, they are generally denied employment because of their disability. Most employers are reluctant to employ PWDs believing that they will be unable to perform their roles and/or that it would be too expensive due to fear and stereotyping, thus focusing more on the disability than on the abilities of the individual.[93] All efforts must be made to encourage employers, particularly those in the private sector, to employ PWDs.

4.3 Vocational rehabilitation

The NWDA provides that government should take measures to promote the employment of PWDs through the establishment of vocational rehabilitation centres in all local government areas and training programmes to develop vocational skills.[94] It also provides that vocational guidance and counselling should be made available to PWDs.[95] However, there are few vocational centres in Nigeria and the availability of vocational guidance counsellors in such centres is doubtful. The government has implemented a community-based vocational rehabilitation project in some states of the country and some of such centres are supported by CBM. For instance, the CBM project 'Services for people with disabilities' supports about 100 persons a year in its economic empowerment and livelihood unit by vocational training and small loans or grants for those that have achieved vocational skills to set up their own micro-businesses.[96] Nevertheless, there is a lack of commitment by the government to provide the requisite manpower and resources to ensure the functioning of such centres. The Nigerian government should therefore be more committed to reducing poverty and unemployment by establishing more vocational centres and providing such centres with the resources to function effectively.

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90 Secs 6(3) & (4) NWDA.

91 Sec 6(6) NWDA.

92 B Doyle *Disability, discrimination and equal opportunity – A comparative study of the employment rights of disabled persons* (1995) 2-3.

93 'UN Enable – International Day of Disabled Persons' http://www.un.org/disabilities/default.asp?id=110 (accessed 15 September 2010).

94 NWDA (n 8 above) sec 6(1).

95 As above.

96 CBM Worldwide 'Others are not so lucky – Vocational training in Nigeria' http://www.cbm.org/en/general/CBM_EV_EN_general_article_45191.html (accessed 4 April 2010).

4.4 Provision of financial resources

There is no express provision for access to financial services or resources in the NWDA or the Constitution. There is therefore a need for a legal framework that reflects the impact of PWDs to make financial decisions at the national level.[97] It is not enough to educate and train PWDs; there is also the need to provide financial services for those who cannot secure employment to arm them with the necessary equipment that they need to be self-employed and possibly become employers of labour themselves. Financial service providers in Nigeria should take into consideration the fact that PWDs are bankable, credit-worthy and that providing them with financial services could be cost-effective. They should therefore endeavour to develop products that are suited to the condition of PWDs to enable them to empower themselves. In order to effectively and efficiently reach out to people with disabilities, financial service providers should work directly with local disability organisations because these organisations offer entry into communities of PWDs and also provide support services.[98] They should actively recruit PWDs as staff members as it could make reaching out to potential clients with disabilities easier and ensure that disability inclusion becomes part of their culture.[99] They should also endeavour to train their staff in order to increase their awareness of the potential of PWDs as clients. In addition, financial service providers should take steps to eliminate barriers that restrict PWDs access to them, including physical access to their premises and facilities and the availability of information.[100]

5 Achieving the economic empowerment of persons with disabilities in Nigeria

The economic empowerment of PWDs in Nigeria is crucial to raising their status and guaranteeing their contribution to the development of society. However, this cannot be achieved without the involvement and participation of all stakeholders: the government, members of the public, the labour market and PWDs themselves.[101] There are various ways through which PWDs could be empowered. They include enacting legislation, proactive governmental interest as well as public awareness and involvement.

97 n 54 above.

98 Goldstein (n 75 above).

99 As above.

100 As above.

101 As above.

5.1 Legislation

The enactment, implementation and enforcement of legislation on the rights of PWDs are ways to ensure that their rights, including socio-economic rights, are guaranteed. Such legislation should adequately contain provisions that guarantee the protection of the rights of PWDs and are backed by sanctions directed against persons that contravene such by the legislation.

The Nigerian Constitution contains provisions that are applicable to PWDs. It provides for the state to direct its policy towards ensuring that the welfare of the disabled is provided for.[102] In addition, section 42 of the Constitution guarantees the right to freedom from discrimination in all its forms against any person, including circumstances of birth. This section could be construed to mean that PWDs should not be subject to discrimination in their bid to be educated or employed because of the circumstances of their birth. Unfortunately, there is a lack of political will and commitment on the part of the Nigerian government to enact new laws protecting PWDs and to enforce the existing ones. This is evidenced by the fact that the programmes and provisions under the NWDA are not implemented. For instance, the National Commission for People with Disabilities, which was established by the Act to promote, amongst other things, the welfare of PWDs, is practically non-functional.[103] The NWDA also lacks penalty sections for the infringement of the rights of PWDs. A law not backed by sanctions is of no effect as enforcement is not achievable. More so, two significant Bills for PWDs were introduced in the National Assembly in the year 2000, namely, a Bill for an Act to provide special facilities for the use of handicapped persons in public buildings and a Bill for an Act to establish a national commission for handicapped persons and to vest it with the responsibility for their education and social development and for connected purposes, but nothing developed from these Bills. Also, in 2004, the National Disabled Trust Fund (Establishment) Bill was presented to the National Assembly, but nothing concrete has come out of it.[104] In addition, only a few states in the country have enacted laws protecting the rights of PWDs. There is therefore a need to either amend the NWDA or to enact a new law to adequately protect the rights of PWDs in Nigeria. As such, state governments in Nigeria ought to make laws to protect the rights of PWDs in respective states. Although the National Assembly must be commended for its zealousness, it lacks legislative competence to legislate laws for the welfare of PWDs as such laws would only be applicable in the Federal Capital Territory, because enacting such legislation is the responsibility of state governments. Nonetheless, the enactment

102 1999 Constitution (n 79 above) sec 16(2)(d).

103 1999 Constitution (n 79 above) sec 14.

104 JA Oluborode 'Human rights crisis in Nigeria' http://www.pambazuka.org/en/category/ comment/47079 (accessed 15 March 2010).

of such laws by the National Assembly could prompt states to enact laws with regard to the economic and social welfare of PWDs.

5.2 Proactive governmental interest

There are few educational institutions, a limited number of adequately trained teachers and a lack of facilities in Nigeria to cater for the special needs of PWDs.[105] This is because the government (state and federal) has shown little or no interest in this regard. As such, the government should be more proactive and direct its policies towards building schools, training teachers, providing facilities, providing employment opportunities and promoting the rights of PWDs. Government should ensure the employment of PWDs by creating awareness of the need for equal opportunities for them and by educating the public on their capabilities. Government should also ensure that qualified PWDs are given an opportunity to work in government agencies and institutions and also ensure that they are given a quota at all levels of government. This would ensure that PWDs are fully integrated into Nigerian society in line with section 2 of the NWDA which provides for the integration of PWDs into the national economy.

5.3 Public awareness and participation

The empowerment of PWDs is not only the responsibility of government but also the responsibility of every Nigerian. It is the responsibility of every Nigerian not to discriminate against PWDs, but to treat them humanely and with dignity. Unfortunately, many Nigerians are either ignorant or uncaring about the plight of such persons. A change in the attitude of Nigerians towards PWDs is therefore an urgent necessity. This is because such attitudinal barriers tend to limit their ability to participate effectively in economic activities.[106] Government should carry out public enlightenment programmes to sensitise the public on their plight and the need to empower and include them in society. In fact, the African Decade of Persons with Disabilities and the CRPD support the need to promote awareness on the rights and capabilities of PWDs.[107]

NGOs and religious institutions in Nigeria also have a role to play in creating awareness on the plight of PWDs. In addition to assisting in the education, rehabilitation and employment of PWDs, they should also carry out programmes geared towards raising awareness about the need to include them in society. NGOs should also utilise their

105 'The lost ones' http://234next.com/csp/cms/sites/Next/Opinion/5493564-184/The_lost_ones_csp (accessed 15 March 2010).

106 Helander (n 22 above).

107 Objective 12 of the African Decade of Persons with Disabilities; art 8 CRPD (n 9 above).

resources to put pressure on government to cater for PWDs and to influence government policies on PWDs.

The private sector also has a role in raising awareness on issues affecting PWDs. Entrepreneurs and company executives should endeavour to contribute to the economic empowerment of PWDs by including their welfare in their corporate/social responsibility plans. An example of such initiative is the 'Disability and U' roadshow and seminar in Nigeria which, since 2006, have been sponsored and organised by MTN to create public awareness on disability issues and to provide assistance to PWDs.

6 The way forward

There is a need for a disability-friendly perspective in legislation/policy making, implementation and enforcement in Nigeria. To this end, government should ensure that enforcement mechanisms and programmes are put in place to ensure that the provisions of the NWDA are effectively implemented and enforced. The NWDA should also be amended to include sanctions for the infringement of the provisions of the Act. The government (both state and federal) should ensure that new and updated laws are enacted to protect the rights of PWDs, especially with regard to education and employment. Nigeria is a party to the CRPD and, as such, the legislature should endeavour to adopt the principles and standards set out in the CRPD into the NWDA and appropriately developed state laws to ensure that the rights of PWDs are protected. This could be done by studying the CRPD and the laws of other countries that have adopted the standards provided by the CRPD.

The government should also be more committed in its efforts to include the education of PWDs in its budget and policies. It should build schools and ensure that they are equipped with appropriate curricula, trained personnel, resources and facilities. Teachers should be trained to cater for different disability conditions in society. The government should also endeavour to implement the 15 per cent tax reduction provided for in the NWDA to encourage employers to employ PWDs. It should equally introduce incentives for employers of labour to encourage them to employ PWDs. A binding quota system backed with an effective enforcement mechanism could be introduced to compel employers to reserve a number of jobs for PWDs in Nigeria like in China, Germany and Thailand, who have adopted laws which prescribe the minimum number of jobs to be reserved for PWDs by employers.

NGOs, private employers and the Nigerian people should also endeavour to play a more active role in aiding government in providing finance for facilities and equipment, building schools and providing employment for PWDs.

7 Conclusion

PWDs desire to be productive but the absence of opportunities and the resulting lack of resources prevent them from achieving their goals, from acquiring needed assets, challenge their dignity, and frustrate any hope that they may have of empowerment.[108] There is therefore a continuing need to promote the understanding of their humanity and abilities so that they are not disregarded, but are empowered to function effectively as members of society.[109] They have great potential which, if given the appropriate opportunities, could be tapped and harnessed for the development of Nigeria. The fact that there is ability in disability is clearly portrayed by Director Roger Ross Williams, whose documentary *Music by Prudence* about a young Zimbabwean PWD, Prudence Mabhena, won Best Documentary Short Film at the 2010 Academy Awards in the United States of America. Hence, the empowerment of PWDs in Nigeria through education, employment, vocational rehabilitation and the provision of financial resources could enable them to provide for themselves, to help alleviate poverty and to contribute to their development and the development of society. The cost of claims on social security and occupational benefit schemes could also be reduced if employees with disabilities are retained at work. They should therefore be given an equal opportunity to participate in all aspects of society.

108 Frieden (n 39 above).

109 DW Anderson 'Human rights and PWDs in developing nations of Africa' presented at the Fourth Annual Lilly Fellows Programme National Research Conference at Sanford University, Birmingham, 13 November 2004 http://www.samford.edu/lillyhuman-rights/papers/Anderson_Human.pdf (accessed 20 November 2011).

AFRICAN HUMAN RIGHTS LAW JOURNAL

The United Nations' Mapping Exercise Report and Uganda's involvement in the Democratic Republic of Congo conflict from 1996 to 2003

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Summary

The United Nations' 'DRC Mapping Exercise Report – Mapping of the most serious human rights and international humanitarian law violations committed in the DRC between 1993-2003 (August 2010)' was finally published in October 2010, albeit with clarifications, after strong objections from the countries that were adversely mentioned in it, including from Uganda. The article discusses the allegations levelled against Uganda in light of findings by other institutions, namely, the African Commission on Human and Peoples' Rights, which in 2003 found Uganda in violation of provisions of the African Charter on Human and Peoples' Rights, and the International Court of Justice, which in 2005 found Uganda responsible for violations of the law of belligerent occupation, human rights and the international law of armed conflict. The key argument of the paper is that, instead of the government of Uganda dismissing the report, it should institute measures to investigate and prosecute its agents who committed crimes during this conflict. As well, instead of dismissing the report as untrue, the Ugandan government should have put the record straight by responding to the allegations.

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1 Introduction

The United Nations (UN) report entitled 'DRC Mapping Exercise – Mapping of the most serious human rights and international humanitarian law violations committed in the Democratic Republic of Congo (DRC) between 1993-2003 (August 2010)' (Mapping Report) accused countries of the Great Lakes region, including Uganda, of committing human rights violations during the successive DRC conflicts which may qualify as war crimes, crimes against humanity and genocide. The report, which was completed in mid-2010, elicited hostility from, amongst others, the government of Uganda. The report, which contains descriptions of over 600 violent incidents occurring within the territory of the DRC between March 1993 and June 2003, is the first and only comprehensive UN document on major human right violations committed in the DRC during this period.

In response to the report, Uganda's Minister of Foreign Affairs, Sam Kutesa, wrote to the UN High Commissioner for Human Rights in Geneva, arguing that[1]

> the allegations made against the Uganda Peoples Defence Forces (UPDF) [were] a belated effort to insinuate that some regional forces committed a reverse genocide against the vanquished ex-FAR [*Forces d'Armée Rwandaise*] and their kin under rout from Rwanda, and in the process mask the failures of the UN in preventing genocide in Rwanda.

In addition, he stated that the report was a sinister tactic to undermine Uganda's resolve to continue contributing to and participating in various regional and international peacekeeping missions, including the African Union Mission in Somalia (AMISOM), the United Nations Mission in Sudan (UNMIS), and the United Nations-African Union Hybrid Mission in Darfur (UNAMID).[2] He concluded by saying that Uganda rejected the report in its entirety and that it should not be published.

It is a known fact that Uganda participated in the different Congolese conflicts, beginning with the 1996-1997 war against the government of President Mobutu in former Zaïre.[3] Subsequently, Uganda was one of the countries that fought against the government of President Laurent Desire Kabila in August 1998. Ugandan forces eventually left the DRC territory in May 2003. Needless to say, the Ugandan army and Ugandan-allied Congolese rebels controlled large swathes of DRC territory between 1998 and 2003. The article specifically discusses the allegations levelled against Uganda. Of the countries named in the report, it is only Uganda that has been found responsible for some of

1 See Uganda's position on the draft DRC Mapping Exercise Report, 27 September 2010 (on file with author) http://www.ohchr.org/Documents/Countries/ZR/DRC_Report_Comments_Uganda. pdf (accessed 23 October 2011).

2 As above.

3 Upon attaining independence, the country was called Congo but, on 27 October 1971, President Mobutu changed its name to Zaïre.

the alleged crimes by a court of law.[4] In December 2005, the International Court of Justice (ICJ) found Uganda responsible for violations of human rights and international humanitarian law when its troops occupied large areas of the DRC.

2 Background to Uganda's involvement in the DRC

Uganda's involvement in the DRC may be divided into two distinct campaigns; 1996 to 1997 and 1998 to 2003. During the 1996-1997 campaign, Uganda, together with Rwanda, Burundi and Angola, helped Laurent Kabila's Alliance of Democratic Forces for the Liberation of Congo (AFDL) to topple the government of Mobutu. During the second campaign that began in August 1998 up to 2003, Uganda sought to remove the AFDL government in the DRC.

2.1 1996-1997 intervention

Following the end of the 1994 Rwanda genocide, over 1 million Rwandan refugees (mainly Hutu) took refuge in Zaïre where they established camps along the border between Rwanda and Zaïre. Some, who had participated in the genocide, started launching attacks in Rwanda, thus provoking the new rulers of Rwanda – the Rwandese Patriotic Front/Army (RPF/A) – to launch counter-insurgency operations against them in Zaïre. Eventually, in 1996, the RPA entered Zaïre to pursue the insurgents and in the process, the refugee camps were dismantled. After dismantling the camps, the RPA decided that it would go all the way and remove Mobutu from power in Kinshasa. It should be recalled that when the RPA attacked Rwanda from Uganda in October 1990, Mobutu sent his troops to shore up the government of President Habyarimana.[5] Thus, for the RPA it was pay-back time.

Laurent Kabila had fought against Mobutu for a long time. In fact, Kabila, a follower of the murdered Congolese independence Prime

4 In 2003, Burundi, Rwanda and Uganda were found by the African Commission on Human and Peoples' Rights to have violated the provisions of the African Charter on Human and Peoples' Rights.

5 According to G Prunier *From genocide to continental war: The 'Congolese' conflict and the crisis of continental Africa* (2009) 67-71, the basic cause that led the Rwandese leadership to attack Zaïre in September 1996 was the presence of the large, partially-militarised refugee camps on its borders. But there was also a broader view, which was a systematic trans-African plan to overthrow the Mobutu regime in Zaïre. Already in November 1994, in the wake of the Rwandan genocide, President Museveni had called a meeting in Kampala of all the 'serious' enemies of Mobutu to discuss the idea of overthrowing him. The conclusion had been that the time was not yet ripe. In early 1995, former President Julius Nyerere had re-launched the idea, developing contacts with a number of African heads of state with the purpose of cleaning up what they looked on as the shame of Africa. Rwanda, because of the refugee question, was of course to be the entry point and the spearhead of the mission. Prunier also recounts an incident where former President Bizimungu on

Minister, Patrice Lumumba, had been one of the leaders of the National Council of Resistance that was formed in the aftermath of Lumumba's assassination to liberate the country. Its eastern front leaders, such as Generals Nicolas Olenga, Christopher Gbenye and Thomas Kanza, were lured out of the rebellion by Mobutu in 1965[6] with Kabila being the only party member who continued to wage a low-intensity struggle against the Mubutu regime in the Fizi-Baraka area until the early 1980s, when he, too, retired to the world of business to engage in cross-border trading in *inter alia* gold and ivory.

When the leaders of Uganda and Rwanda started looking for a Congolese who could lead the war against Mobutu, Kabila presented himself as the natural choice due to his long resistance against the Kinshasa regime. The AFDL, comprising four groups, namely, *Parti de la Révolution Populaire* (People's Revolutionary Party), which was founded in 1968 by Laurent Kabila; *Conseil National de Résistance pour la Démocratie* (National Resistance Council for Democracy), led by Andre Kisasu Ngandu with a Lumumbist association; *Mouvement Révolutionnaire pour la Libération du Zaïre* (Revolutionary Movement for the Liberation of Zaïre), led by Masasu Nindanga; and *Alliance Démocratique des Peuples* (Democratic Peoples' Alliance), led by Deogratias Bugera with Congolese Tutsi associates, was established on 18 October 1996[7] 'to help the Rwandan, Ugandan, Congolese and later on Angolan military forces that were fighting against Mobutu to support their efforts'.[8] The AFDL was meant to give the foreign military campaign against Mobutu a revolutionary or civil war character.[9] Nevertheless,

3 October 1996 addressed the press and presented a map of Rwanda purporting to show large areas of North Kivu and smaller parts of South Kivu in Zaïre, as having been tributaries of the former Rwandese monarchy. Bizimungu had averred that if Zaïre gives back its Rwandese population, then it should also give back the land on which it (the population) lives. Prunier clearly insinuates that Rwanda's attack on Zaïre could also have been motivated by territory acquisition ambitions.

6 G Nzongola-Ntalaja *The Congo: From Leopold to Kabila: A people's history* (2002) 135.

7 International Crisis Group 'Congo at war: A briefing of the internal and external players in the Central African conflict' Africa Report (1998) 14 http://www.crisisgroup.org/ en/regions/africa/central-africa/dr-congo/002-congo-at-war-a-briefing-of-the-internal-and-external-players-in-the-central-african-conflict.aspx (accessed 23 November 2011). See also G Nzongola-Ntalaja *From Zaïre to the Democratic Republic of Congo* (2004) 13, observing that the Lemera Protocol of 18 October 1996 established the AFDL as an alliance of four groups.

8 PA Kasaija 'Rebels and militias in resource conflict in the Eastern Democratic Republic of Congo (DRC)' in W Okumu & A Ikelegbe (eds) *Rebels, militias and Islamist militants: Human insecurity and state crises in Africa* (2010) 187.

9 International Crisis Group 'Democratic Republic of Congo: An analysis of the agreement and prospects for peace' Africa Report 5 (1999) 1 http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/005-democratic-republic-of-congo-an-analysis-of-the-agreement-and-prospects-for-peace.aspx (accessed 23 November 2011).

the rebellion was supported, militarily and financially, by Rwanda and Uganda.[10]

Uganda argued that it was supporting the Kabila rebellion because the government of Mobutu had failed to stop rebel forces opposed to Museveni's National Resistance Movement (NRM) government from using the DRC to attack Uganda.[11] Indeed, on 12 November 1996, a rebel group called the Allied Democratic Forces (ADF) attacked Uganda from the direction of the DRC. Although the Ugandan army repelled the invaders, this gave the Museveni government the excuse to support the Kabila forces that were then fighting the government of Mobutu.

On 17 May 1997, AFDL rebels led by Kabila entered Kinshasa, thus ending Mobutu's 32 years in power. Kabila declared himself the new President of Zaïre and renamed the country Democratic Republic of the Congo, with a new flag and national anthem.[12] The war that brought him to power had started in the east of the country, mainly in the provinces of North and South Kivu.

2.2 1998-2003 intervention

The Second Congo War, which began on 2 August 1998, has been described as 'Africa's First World War'[13] because at its height, it directly involved eight African countries[14] together with a multitude of irregular forces. According to Nzongola-Ntalaja, the war was for 'the natural resources of the Congo'[15] and resulted in the death of more than 3 million Congolese in the period up to November 2002 from war-related causes, such as malnutrition, lack of health care and dangerous living conditions.[16] One needs to ask as to the context of Uganda's involvement in this war.

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10 GS Gordon 'An African Marshall Plan: Changing USA policy to promote the rule of law and prevent mass atrocity in the DRC' (2009) 32 *Fordham International Law Journal* 1371.

11 PA Kasaija 'International law and Uganda's involvement in the DRC conflict' (2001/2002) 10 *University of Miami International and Comparative Law Review* 75.

12 G Nzongola-Ntalaja 'The role of intellectuals in the struggle for democracy, peace and reconstruction in Africa' (1997) 2 *Africa Journal of Political Science* 2.

13 Prunier (n 5 above) 285. See also International Crisis Group 'Africa's seven nation war' Africa Report 4 (1999) http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/004-africas-seven-nation-war.aspx (accessed 23 November 2011).

14 The eight were Burundi, Rwanda and Uganda, on the side of the rebels, and Angola, Chad, DRC, Namibia and Zimbabwe on the side of the Kabila government.

15 Nzongola-Ntalaja (n 7 above) 16.

16 As above. A series of mortality surveys, conducted by the international non-governmental organisation, the International Rescue Committee (IRC) between 1998 and 2002, showed that an estimated 3,3 million people had died as a consequence of the war. See IRC 'Mortality in the Democratic Republic of Congo: Results from a nationwide survey' (April-July 2004) http://www.rescue.org/sites/default/files/resource-file/DRC_MortalitySurvey2004_Final_9Dec04. pdf (accessed 20 October 2011).

At President Kabila's inauguration in May 1997, President Museveni was an important invited guest. However, relations between Kabila and Museveni turned sour soon thereafter. On 27 July 1998, Kabila decided to terminate Rwanda's military and technical co-operation and to put an end to the presence of all foreign troops throughout the national territory.[17] According to some commentators, this action was prompted by Kabila learning of a planned *coup d'état* against him by the Rwandan chief of staff of the Congolese army.[18] But even before this event, relations between Museveni and Kabila had thawed. This is exemplified by the fact that Museveni refused to honour Kabila's invitation to attend the first anniversary celebrations of his ascendance to power. The reason for the thawing of relations has been attributed to the failure of Kabila to implement a memorandum of understanding which he had concluded with the Ugandan government to the effect that the UPDF would conduct joint operations with the *Forces Armée Congolaise* (FAC), to stop the DRC territory from being used by the Uganda rebels to launch armed attacks on Uganda. In fact, three memoranda of understanding had been signed between the DRC and Uganda, covering an agreement for joint operations between the UPDF and the FAC; an agreement between the DRC, Uganda and the United Nations High Commissioner for Refugees (UNHCR) to repatriate DRC refugees from Kyaka I and II; and an agreement for the Uganda police to train the DRC police on handling riots.[19]

When the news of Uganda's participation in the new rebellion against Kabila became public, the Ugandan government vehemently denied its involvement. The then Ugandan Foreign Affairs Minister, Eriya Kategaya, issued a statement rebutting accusations that Uganda had invaded the DRC.[20] However, one month after the outbreak of the rebellion, President Museveni defined Uganda's security interests in the DRC as 'Congo's territory being used by Sudan to infiltrate terrorists into Uganda; Congo's territory not being used by the *Interahamwe* to kill people in Kisoro; together with the international community not allowing genocide to take place [in the DRC]; and the hope that the Congolese people can be democratically empowered after a generation of Mobutuism'.[21] However, he did not say whether Ugandan troops were actually present in the DRC.

On 26 August 1998, Kategaya told Uganda's Parliament that indeed the UPDF was actually deployed in the DRC. He explained that the UPDF was in the DRC to protect the country's legitimate interests. He

17 According to DRC's ambassador to the United Nations, Kabila took this decision 'after consultations with his Rwandan and Ugandan counterparts'.

18 FZ Ntoubandi 'The Congo/Uganda case: A comment on the main legal issues' (2007) *7 African Human Rights Law Journal* 163.

19 Kasaija (n 11 above) 77.

20 As above.

21 Kasaija (n 11 above) 76.

did not elaborate what these interests were. This was later elaborated on by Major General Salim Saleh, then 'overseer' of the Ministry of Defence and Presidential Advisor on Defence and Military Affairs, who stated that 'Uganda troops will remain deep in the Congo until Kabila [accepted] a political solution to the crisis'.[22] He further said that '[Uganda had] evidence that Kabila was arranging to attack [Uganda] on all frontiers',[23] thus Uganda had to move very fast to forestall such an attack.

In spite of the numerous peace conferences and agreements, the UPDF remained in the DRC. Between 1998 and 1999, Uganda created a number of Congolese rebel movements in the areas it occupied. For example, in 1998, Uganda helped create the *Mouvement pour la Libération du Congo* (MLC) led by Jean Pierre Bemba, a Congolese businessman who had hitherto been based in Brussels, Belgium. As the war against the Kabila government stalled due to the entry into the conflict of countries such as Zimbabwe, Namibia, Angola and Chad on the side of Kabila, Uganda saw the need to create a new group and front to fight the Kabila government. Since it controlled large swathes of DRC territory to the east and north-east, the military strategy that Uganda adopted involved empowering the Congolese people politically and militarily in the hope that they would overthrow Kabila themselves, thus the creation of the MLC.

With the help of Uganda, the MLC was able to raise a militia of between 15 000 and 20 000 members who operated in areas controlled by the

22 As above.

23 As above. The clearest rationalisation as to why Uganda got entangled in the DRC was spelled out in detail by the Minister of State for Foreign Affairs in charge of Regional Co-operation, Amama Mbabazi, while addressing the 53rd General Assembly Session of the UN in New York. The reasons for Uganda's involvement in the DRC were presented in terms of both external and internal dimensions. The external dimensions were spelled out as: attacks by ADF rebels on Uganda from the DRC, from the Mobutu regime through to the present Kabila regime, necessitating self-defence and hot pursuit by Uganda into the DRC; an understanding between the Kabila regime and the Ugandan regime to collaborate in the task of flushing out of Ugandan rebels from the DRC; collusion between the DRC and the Khartoum regime to provide operational bases and material support to the rebels in the DRC, as well as to avail to the Khartoum regime the use of the DRC territory as a launching pad for attacks on Uganda; and the (unexpected) involvement of other new actors (Namibia, Angola, Zimbabwe and Chad) which acted as a catalyst to increase the level of Uganda's own intervention. The internal dimensions were spelled out as: the breakout of the rebellion of 2 August 1998 in the DRC, arising from the alienation of Congolese political actors excluded from the narrowly-based and sectarian regime established by Kabila after his ascent to power in 1997; the imminent threat of another genocide in the region, arising from Kabila's open support to the Rwandese *Interahamwe* and ex-FAR or Rwandese soldiers of the late Habyarimana regime on the territory of the DRC; Uganda's obligation (which should, incidentally, be the obligation of the rest of the international community, as well) to stop this threatening crime against humanity; and the need to look at the idea of the sacrosanctity of national sovereignty and of territorial borders more critically in circumstances involving such grave threats to human life as those prevailing in the DRC and in the Sudan.

Ugandan military.[24] When President Museveni was asked why he was supporting many rebel groups in DRC, including the MLC, he replied that 'a good hunter sends out several dogs because he cannot know in advance which one will be the best'.[25] MLC militias and the Ugandan soldiers exploited minerals and other natural resources such as timber in the areas they controlled. President Museveni even allowed Bemba and his group to use the military airport at Entebbe in Uganda to cheaply transport their 'goods' to and from the DRC. Young men aged between 12 and 18 years were reportedly recruited into the MLC and sent to mines to dig for gold on behalf of the Ugandans and Bemba.[26]

Other than MLC, Uganda also supported other Congolese rebel movements, including the Rally for Congolese Democracy-Liberation Movement (RCD-ML), led by Professor Wamba dia Wamba;[27] the Rally for Congolese Democracy-National (RCD-N), led by Roger Lumbala; the Union of Congolese Patriots (UPC), led by Thomas Lubanga; the Party for Unity and Safeguarding of the Integrity of Congo (PUSIC); the Front for Integration and Peace in Ituri (FIPI); and the Nationalist and Integrationist Front (FNI).[28]

Following international pressure[29] and the Luanda agreement between the DRC and Uganda,[30] the UPDF finally withdrew from the DRC in May 2003.

3 Allegations against Uganda

Allegations against Uganda cover the periods June 1996 to May 1997, August 1998 to January 2000 and January 2001 to June 2003. In the

24 F Soudan 'Justice: L'Affaire Bemba' *Jeune Afrique* 1-7 June 2008 26.

25 PA Kasaija 'The politics of conflict resolution in the Democratic Republic of Congo (DRC): The inter-Congolese dialogue process' (2004) 4 *African Journal on Conflict Resolution* 75.

26 Judicial Commission of Inquiry into Allegations of Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC, Final Report (S/2003/1027) (2002) 71.

27 Also called RCD-Kisangani. The different permutations of RCD emerged after the main RCD broke up in May 1999.

28 For a comprehensive list of the rebel movements and their state supporters, see Kasaija (n 8 above).

29 Eg UN Security Council Resolution 1304 (2000), 16 June 2000 S/RES/1304(2000), para 4 demanded that 'Uganda ... which ha[s] violated the sovereignty and territorial integrity of the Democratic Republic of the Congo, withdraw all [its] forces from the territory of the Democratic Republic of the Congo without further delay ...'; UN Security Council Resolution 1341 (2001), 22 February 2001, S/RES/1341(2001), para 2 demanded that 'Ugandan ... forces ... withdraw from the territory of the Democratic Republic of the Congo ...'

30 Agreement between the governments of DRC and the Republic of Uganda on the withdrawal of Ugandan troops from the DRC, co-operation and normalisation of relations between two countries (6 September 2002) http://www.iss.co.za/AF/profiles/drcongo/cdreader/bin/5luanda.pdf (accessed 30 September 2010).

period between June and May 1997, the allegations against Uganda broadly include killing Hutu Banyarwanda refugees in June 1996;[31] the recruitment of minors in the army in November 1996;[32] the mistreatment of child soldiers in March 1997;[33] and, after the capture of Kinshasa in May 1997, armed forces, including the UPDF, carrying out acts of torture, summary executions and rape in towns, including Kisangani.[34]

The period between August 1998 and January 2000 includes 200 incidents and is characterised by the intervention on the territory of the DRC of the government armed forces of several countries, fighting alongside the FAC (Angola, Namibia and Zimbabwe) or against them (Burundi, Rwanda and Uganda), and also the involvement of multiple militia groups and the creation of a coalition under the banner of a new political and military movement called the RCD, which would later on several occasions split. Participants in these conflicts included at least eight national armies and 21 irregular armed groups. Allegations against Uganda in this period include numerous instances between July and September 1998 of murder of civilians, rape and pillaging;[35] using indiscriminate and disproportionate force against combatants and civilians;[36] instituting a reign of terror in the town of Beni with complete impunity by carrying out summary executions of civilians, torturing of civilians, including subjecting them to various forms of inhuman and degrading treatment, detaining civilians in holes dug two to three metres deep in the ground where they were forced to live exposed to bad weather with no sanitation and on muddy ground;[37] pillaging the town of Kinsangani following fighting with the APR in August 1999 and May to June 2000;[38] the displacement of civilians in Kisangani town following fighting with the APR in May to June 2000;[39] participating in the destruction of over 400 private homes and causing damage to public and commercial properties, places of worship, educational institutions and healthcare facilities, including hospitals,

31 Office of the UN High Commissioner for Human Rights 'Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003' (August 2010) (Mapping Report), para 271.

32 Para 285 Mapping Report (n 31 above).

33 Para 290 Mapping Report.

34 Para 290 Mapping Report.

35 Paras 330, 346, 347, 348, 349, 361, 362, 363, 365, 366 & 370 Mapping Report.

36 Para 347 Mapping Report.

37 Para 349 Mapping Report.

38 Paras 361 & 363 Mapping Report.

39 Para 363 Mapping Report.

following fighting with the APR in Kisangani town from May to June 2000;[40] and executing prisoners of war.[41]

The period of January 2001 to June 2003 includes 139 incidents of violations and was particularly marked with ethnic fighting between the Hema and Lendu in the province of Ituri, reaching unprecedented levels, with the intervention of Uganda on the side of the Hema. Allegations against Uganda in this period include the murder of all those who dared to dispute the authority of UPDF or criticised its involvement in the pillaging of the natural resources of the region;[42] raping, looting and causing an unknown number of people to disappear;[43] participating in the killing of six International Committee of the Red Cross (ICRC) workers in April 2001;[44] killing members of the Lendu community;[45] and looting and destroying numerous buildings, private homes and premises used by local and international non-governmental organisations (NGOs) in Bunia town in March 2003.[46]

4 Analysis of the allegations against Uganda

The Mapping Report notes that Uganda's involvement in the conflict begins during the first Congo war between July 1996 and July 1998.[47] Under the cover of the AFDL, whose own troops, weapons and logistics were supplied by Rwanda, soldiers from the RPA, the UPDF and the *Forces Armées Burundaises* (FAB) entered Zaire *en masse* and set about capturing the provinces of North and South Kivu, and the Ituri district. In fact, it has been observed that from the second half of 1995, the Rwandan authorities, in co-operation with those in Kampala, began their preparations to facilitate a mass military intervention of the Zairian territory by the RPA and UPDF, under the guise of a domestic rebellion.[48] To enable the rebellion to surface, Rwandan and Ugandan leaders requested the help of Tutsis in Zaire who had served in the RPF and RPA for several years to mass recruits in North and South Kivu to start a Banyamulenge rebellion.[49]

The allegations against Uganda specifically centre on two issues: violations of human rights and international law of armed conflict; and engaging in illegal exploitation of the DRC's natural resources. The alle-

40 As above.
41 Para 385 Mapping Report.
42 Para 402 Mapping Report.
43 Paras 402, 408, 421, 433 & 444 Mapping Report.
44 Para 408 Mapping Report.
45 Para 409 Mapping Report.
46 Para 421 Mapping Report.
47 Para 178 Mapping Report.
48 Mapping Report 70.
49 As above.

gations against Uganda that are discussed below are those that have been pointed out by the Mapping Report and corroborated upon by numerous NGOs and the ICJ in the *Case Concerning Armed Activities on the Territory of Congo* (*Democratic Republic of Congo v Uganda*) (*DRC* case).[50]

4.1 Recruitment of children

The first allegation against Uganda was the recruitment of child soldiers. The wars in the DRC were also marked by the systematic use of children associated with armed groups and forces (CAAFAG) by all parties to the conflict. It is estimated that 'at least 30 000 children were recruited or used by the armed forces or groups during the conflict'.[51] According to the Report, 'from November 1996, the AFDL/UPDF soldiers recruited thousands of young people, including many minors, across the Ituri district'.[52] In 2000, at least 163 of these children were sent to Uganda to undergo military training at a UPDF camp in Kyankwanzi before finally being repatriated to Ituri by the United Nations Children's Fund (UNICEF) in February 2001.[53] Congolese rebel militias supported by Uganda recruited children in their ranks with abandon. For example, the report notes that the CLM with the backing of the UPDF recruited children, primarily in Mbandaka, Équateur Province and, by 2001, the rebel militia admitted to having 1 800 CAAFAG within its ranks.[54] Children abducted by RCD-ML, another rebel group allied to Uganda, 'were sometimes taken to Uganda to undergo military training'.[55]

In the *DRC* case, the ICJ concluded that there was 'convincing evidence of the training in the UPDF training camps of child soldiers, and of the UPDF's failure to prevent the recruitment of child soldiers in areas under its control'.[56] The UPDF engaged in a systematic cross-border deportation of recruited Congolese children from the Bunia, Beni and Butembo regions to Uganda. The Ugandan army itself admitted to training Congolese recruits, including children.[57] Thomas Lubanga, the leader of the UPC and an ally of Uganda during the conflict, admitted to recruiting children, with some estimates stating that 40 per cent of

50 *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* ICJ (19 December 2005) (2005) ICJ Reports 168.

51 UN Mission in the DRC, Child Protection Section '*La justice et le recrutement et l'utilisation d'enfants dans des forces et groupes armés en RDC*' (2005) http://www.unhcr.org/refworld/pdfid/46caaafcd.pdf (accessed 2 October 2010).

52 Para 285 Mapping Report (n 31 above).

53 Para 429 Mapping Report.

54 Para 697 Mapping Report.

55 Para 698 Mapping Report.

56 Para 210 Mapping Report.

57 PA Kasaija 'The implications of the arrest of Jean Pierre Bemba by the International Criminal Court' (2008) 14 *East African Journal of Peace and Human Rights* 259.

his army was made up of children.[58] In fact, he was later to be indicted by the International Criminal Court (ICC) on charges of recruiting children in his militia. Thus, there is clear evidence of Uganda violating the international humanitarian laws of armed conflict. The recruitment of children into armed forces is a war crime under the Rome Statute.[59] Moreover, the African Charter on the Rights and Welfare of the Child (African Children's Charter), which came into force in 1999, establishes that a 'child' is anyone below the age of 18. Uganda is a state party to this Charter, which also declares that 'States Parties ... shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child'.[60]

4.2 Murder

The accusations against Uganda regarding attacks on the civilian population started during the second DRC war that began in August 1998. The report observes that throughout their advance on Kinshasa, the Rwandan-Ugandan-Congolese coalition killed numerous civilians and committed a large number of rapes and acts of pillaging.[61] In this regard, the report goes on to list specific incidents such as that,[62] on 7 August 1998, during fighting between elements of the coalition and FAC for the control of Boma, the former killed at least 22 civilians close to the central bank and municipal gardens. The victims included gardeners, workers at the abattoir, two people with learning disabilities and people waiting for a vehicle to take them to Moanda. On 13 August 1998, the coalition soldiers stopped the turbines on the Inga dam, depriving Kinshasa and a large area of the province of Bas-Congo of their main source of electricity for almost three weeks. By making property essential to the survival of the civilian population unusable, they caused the death of an unknown number of civilians, particularly children and hospital patients.

Elsewhere, the Report details the activities of the UPDF in the Beni and Butembo areas. It observes that 'UPDF soldiers often made disproportionate use of force during these attacks, killing combatants and civilians indiscriminately'.[63] The Report cites specific incidents where the Ugandan army killed people, *inter alia*,[64] on 1 November 2000, UPDF soldiers killed between seven and 11 people during an attack on the population of the villages of Maboya and Loya, 16 kilometres north

58 As above.

59 Arts 8(2)(b)(xxvi) & 8(2)(e)(vii) Rome Statute of the International Criminal Court, A/CONF 183/9 (1998).

60 Art 22(2) African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990).

61 Para 330 Mapping Report (n 31 above).

62 As above.

63 Para 347 Mapping Report.

64 Paras 330, 347, 348 & 349 Mapping Report.

of the town of Butembo, after the rebels of Vurondo Mayi-Mayi had killed four UPDF soldiers near the village of Maboya; on 9 November 2000, UPDF soldiers indiscriminately killed 36 people in the village of Kikere, close to Butuhe, north of Butembo; and in March 2000, UPDF soldiers killed four civilians and wounded several others in the town of Beni during an operation to quell a demonstration. The victims had been protesting against the murder of a woman, the arbitrary arrest of her husband and the pillaging of their house, committed a few days earlier by UPDF soldiers.

In the *DRC* case, the ICJ found that 'the UPDF ... failed to distinguish between combatants and non-combatants in the course of fighting against other troops'.[65] According to the United Nations Mission in Congo (MONUC), while the UPDF was fighting in the Ituri region, 'several civilians were killed, others were wounded by gunshots; shops looted ... [while] stray bullets ... killed civilians; others had their houses shelled'.[66] Human Rights Watch, on the same issue, observed that 'local militias, sometimes in collaboration with Ugandan soldiers, committed violations of international humanitarian law including the deliberate killing of civilians, numerous cases of rape, looting and some acts of cannibalism'.[67]

The failure by Uganda to protect the population, as well as being a war crime under the Rome Statute, was a breach of the Geneva Conventions. The ICJ noted in the *DRC* case that indiscriminate shelling was a grave violation of humanitarian law. Customary international humanitarian law prohibits armed groups from directly attacking civilians or carrying out attacks that have a disproportionate or indiscriminate effect on the civilian population.

4.3 Torture and other inhuman and degrading treatment

According to the Report, in the town of Beni, for example, UPDF soldiers instituted a reign of terror for several years with complete impunity.[68] They carried out summary executions of civilians, arbitrarily detained large numbers of people and subjected them to torture and various other forms of cruel, inhuman or degrading treatment. They also introduced a particularly cruel form of detention, by putting the detainees in holes dug two or three metres deep into the ground, where they were forced to live exposed to bad weather, with no sanitation and on muddy ground. The Report cites specific incidents when UPDF carried out torture. For example, it notes that from 2001 to January 2003, elements of the ALC/UPDF tortured and killed an unknown

65 *Armed Activities on the Territory of the Congo* case (n 50 above) para 208.

66 As above.

67 See generally Human Rights Watch 'Ituri: Covered in blood – Ethnically-targeted violence in North-Eastern Congo' (July 2003).

68 Paras 349 & 444 Mapping Report.

number of civilians in the town of Buta. Most of the victims were held in muddy holes in conditions likely to cause death through disease or exhaustion.[69]

In the *DRC* case, the ICJ unequivocally established that Uganda was an occupying power in the Ituri region, during the time when the UPDF was deployed there in accordance with the Hague Regulations of 1907.[70] As an occupying power, therefore, Uganda was under a duty to take all necessary measures in its power to restore and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. The duty also entailed 'securing the respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party'.[71]

On the specific issue of torture, the ICJ concluded that Ugandan troops were responsible for acts of torture and other acts of inhuman treatment against the civilian population in the Ituri region.[72] Therefore, Uganda was not only in breach of general international law, such as the Convention against Torture (CAT), but also the Rome Statute.[73]

4.4 Rape

The Report observes that rapes were also reportedly committed by Ugandan soldiers during the two ensuing wars, in 2000.[74] It specifically cites incidences of rape committed by the UPDF, *inter alia*, between 7 and 10 August 1998, in Boma, elements from the UPDF confined and raped several women in the Premier Bassin hotel, which they had requisitioned;[75] between January and February 2001, UPDF soldiers attacked around 20 villages in the Walendu Tatsi community [in the Ituri region], killing around 100 people, including various Lendu civilians. During the attacks, the soldiers also committed rape, looted and caused an unknown number of people to disappear;[76] in

69 Para 402 Mapping Report.

70 *Armed Activities on the Territory of the Congo* case (n 50 above) para 178. The cited provision is art 43 of Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, which states: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'

71 *Armed Activities on the Territory of the Congo* case (n 50 above) para 178.

72 *Armed Activities on the Territory of the Congo* case (n 50 above) para 211.

73 Arts 7(1)(f) & (k), 8(2)(a)(ii) & (iii), 8(2)(b)(xxi), 8(2)(c)(i) & (ii).

74 Para 583 Mapping Report.

75 Para 330 Mapping Report.

76 Para 405 Mapping Report.

2001, elements of the UPDF allegedly killed an unknown number of people in the village of Irango and they also raped numerous girls;[77] and between February and April 2002, elements of the UPDF raped an unknown number of people in the Walendu Bindi community in the Irumu region.[78]

In addition to directly committing rape, the UPDF abetted the commission of rape by local militia groups, especially in the Ituri region. Human Rights Watch observed that 'local militias, sometimes in collaboration with Ugandan soldiers, committed violations of international humanitarian law including ... numerous cases of rape'.[79] The Mapping Report in this regard observes that numerous rapes were committed by the Lendu militia, which subsequently became the FNI and the FRPI, and by the Hema of the UPC, over the course of successive battles to capture Bunia.[80] It should be noted that all these were local militia groups operating in the Ituri area allied to Uganda.

Although in the *DRC* case the ICJ did not find directly that the UPDF had committed acts of rape, it did conclude that Uganda had failed miserably in its duty to enforce adherence to international human rights and humanitarian law in the Ituri region by its soldiers and the local militias that operated there. There was, the ICJ concluded, a 'lack of vigilance [on the part of Uganda] in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account'.[81] Suffice it to note that an act of rape can qualify to be a war crime,[82] a crime against humanity[83] and even genocide.

4.5 Fighting in Kisangani

Simmering tensions between Uganda and Rwanda for the control of the city of Kisangani deteriorated into open warfare in August 1999. The city had been captured by Rwanda during the second Congo war, and it had invited Uganda to come in, the idea being that the UPDF would occupy the liberated zones while the RPA would advance quickly to the frontline.[84] According to the Mapping Report,[85] on the morning

77 Para 443 Mapping Report.

78 Para 408 Mapping Report.

79 See generally Human Rights Watch (n 67 above).

80 Paras 605, 606 & 607 Mapping Report.

81 Para 179 Mapping Report.

82 Eg, see arts 8(b)(2) & 8(e)(2) of the Rome Statute.

83 Eg, see *Prosecutor v Jean Paul Akayesu* judgment, Case ICTR-96-4-T, 2 September 1998.

84 International Crisis Group 'Uganda and Rwanda: Friends of enemies?' Africa Report 14 (2000) 7 http://www.crisisgroup.org/en/regions/africa/central-africa/rwanda/014-uganda-and-rwanda-friends-or-enemies.aspx (accessed 23 November 2011).

85 Para 361 Mapping Report.

of 7 August RPA and UDPF soldiers fought with heavy weapons for several hours without any civilians being wounded. Tension continued to build, nonetheless, and both sides strengthened their positions and brought large numbers of weapons into the town. On the evening of 14 August, fighting again broke out between the two armies at the airport and extended along the main roads and into the town centre. From 14 to 17 August 1999, APR and UPDF soldiers used heavy weapons in areas with a dense civilian population as they fought to gain control of the town of Kisangani. The fighting caused the deaths of over 30 civilians and wounded over 100 of them. Once the hostilities were over, Rwandan and Ugandan soldiers pillaged several places in Kisangani.

In May 2000, however, tension between the Ugandan and Rwandan armies in Kisangani again increased.[86] The UPDF strengthened its military positions to the northeast of the town and the APR reacted by bringing in additional weapons. On 5 May 2000, the RPA and UPDF used heavy weapons in densely-populated areas, causing the deaths of over 24 civilians and wounding an unknown number of them.

Fighting broke out again on 5 June, however, resulting in the so-called 'Six-Day War'.[87] The RPA and UPDF fought each other in Kisangani from 5 to 10 June 2000. Both sides embarked on indiscriminate attacks with heavy weapons, killing between 244 and 760 civilians according to some sources, wounding over 1 000 and causing thousands of people to be displaced. The two armies also destroyed over 400 private homes and caused serious damage to public and commercial properties, places of worship, including the Catholic Cathedral of Notre Dame, educational institutions and healthcare facilities such as hospitals.

The fighting in Kisangani between Uganda and Rwanda was due to persistent and serious differences over the objectives and strategies of the war in the DRC.[88] As observed elsewhere, during the war to topple Laurent Kabila while Rwanda favoured a lightning strike on Kinshasa resulting in it assuming power, Uganda argued for a military strategy that would involve empowering the Congolese people politically and militarily so as to overthrow the Kabila government themselves.[89] In fact, the differences in strategy led to the breakup of the rebel group, the RCD, that had been established in Kigali in preparation to taking control in Kinshasa once Kabila had been overthrown.[90]

An exposition of all the reasons for the fighting in Kisangani is beyond the purview of this article. Nevertheless, it appears that the immediate

86 Para 362 Mapping Report.

87 Para 363 Mapping Report.

88 International Crisis Group (n 84 above) 8.

89 Kasaija, (n 57 above) 250-251. See also n 84 above, 8.

90 Of the RCD leadership, Wamba dia Wamba accepted Uganda's strategy, while Emile Ilunga, Bizima Karaha, Moise Nyarugabo, Lunda Bululu and Alexis Tambwe agreed with Rwanda.

triggers of the fighting were the inflated egos of the commanders on the ground. The commander of the Ugandan forces, Brigadier James Kazini, threatened to arrest Major Jean Pierre Ondekane, the first Vice-President of the RCD-Goma faction supported by Rwanda. Kazini accused RCD-Goma of not having any plan to liberate the Congolese people, while Ondekane accused him of disarming RCD-Goma soldiers and stealing Congolese natural resources.[91] When Rwanda sent Colonel James Kabarebe to reinforce the RPA Kisangani front, the UPDF officers referred to him as a 'small corporal'.[92] The fighting between the two armies resulted in the death of combatants and civilians and the destruction of property, as described by the Mapping Report.

Both Uganda and Rwanda agreed to set up a commission headed by the heads of both armies to investigate the cause(s) of the conflict. The joint inquiry report of October 1999 largely blamed the UPDF for initiating the fighting of August 1999.[93] Whilst Rwanda accepted the report, Uganda rejected it, arguing that the investigation had failed to interview key witnesses. Uganda's rejection of the inquiry report set the stage for the next round of battles between the two countries that took place from May to June 2000.

Regarding the fighting in Kisangani, the UN Security Council 'deplor[ed] the loss of civilian lives, the threat to the civilian population and the damage to the property inflicted by the forces of Uganda and Rwanda on the Congolese population'.[94] The UN Secretary-General concluded that '[Rwandan and Ugandan armed forces] should be held accountable for the loss of life and the property damage they inflicted on the civilian population of Kisangani'.[95]

In the *DRC* case, the ICJ rejected Uganda's contention that the Court could not pronounce itself on the fighting in Kisangani in 1999 and 2000 in the absence of Rwanda.[96] The Court, *inter alia* on the Kisangani fighting, concluded that 'massive human rights violations and grave breaches of international humanitarian law were committed by the UPDF on the territory of Congo'.[97] On the specific proven allegation of shelling of schools, medical facilities, cathedrals, more than 4 000 houses and other public buildings by the UPDF,[98] the Court found that 'the UPDF failed to protect the civilian population and to distinguish

91 International Crisis Group (n 84 above) 14.

92 n 84 above, 15.

93 As above.

94 UN Security Council Resolution 1304 (2000), 16 June 2000, S/RES/1304(2000), Preamble para 8.

95 UN Security Council, Third Report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC), S/2000/566, 12 June 2000, para 79.

96 *Armed Activities on the Territory of the Congo* case (n 50 above) paras 196-204.

97 *Armed Activities on the Territory of the Congo* case (n 50 above) para 207.

98 *Armed Activities on the Territory of the Congo* case (n 50 above) para 208.

between combatants and non-combatants in the course of fighting other troops'.[99] It concluded that 'indiscriminate shelling is a grave violation of humanitarian law'.[100]

4.6 Plundering of DRC's natural resources

The DRC is home to an abundance of natural resources, ranging from a multitude of minerals – including diamonds, gold, copper, cobalt, cassiterite (tin ore) and coltan – to timber, coffee and oil. This vast natural wealth has scarcely benefited the Congolese people, however, and has in contrast been the cause of numerous serious human rights abuses and violations of international humanitarian law. The issues of natural resource exploitation and human rights have been very closely linked in the DRC for many years, dating back to colonial times and the three decades of President Mobutu Sese Seko's rule.

During Mobutu's rule, natural resource exploitation in Zaire was characterised by widespread corruption, fraud, pillaging, bad management and a lack of accountability. The regime's political/military elites put systems in place that enabled them to control and exploit the country's mineral resources, thereby amassing great personal wealth but contributing nothing to the country's sustainable development. Very little of the revenue from natural resource exploitation has been ploughed back into the country to contribute to its development or to raise living standards.

During the first Congo war, a growing number of foreign actors became directly involved in exploiting the DRC's natural resources. Rebel groups and armies from neighbouring countries all participated, some (such as Zimbabwe) with the blessing of the Congolese authorities, others (such as Uganda and Rwanda) either through the intermediary of their Congolese partners or connections or by directly occupying a part of the country.[101] During the second war, however, natural resource exploitation became increasingly attractive, not only because it enabled the countries and groups to finance their war efforts, but also because, for a large number of political/military leaders, it was a source of personal enrichment. Natural resources thus gradually became a driving force behind the war.[102] Even presently, the war raging in Eastern DRC is largely fuelled by the urge by the different Congolese rebel and militia and foreign groups to control the natural resources found there.[103]

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99 As above.

100 As above.

101 Para 732 Mapping Report.

102 See generally Addendum to the Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC (S/2001/1072) 13 November 2001.

103 See generally Kasaija (n 8 above).

The accusation of the UPDF plundering DRC natural resources appears in several places in the Mapping Report. It observed that the violent battles for control of Kisangani between 1999 and 2000 and the associated violations of human rights and international humanitarian law can be explained, at least in part, by the struggle to maintain control of its economic resources.[104] The town of Kisangani is in a region that is not only rich in diamonds and timber, but being situated on a river, it also forms an important trading and transport crossroad, linking Eastern DRC with the rest of the country. The Rwandan and Ugandan armies and the RCD-Goma obtained significant revenue from trading diamonds in and around Kisangani. During the three wars for control of Kisangani, competition for the region's natural resources and the town's strategic importance were factors that precipitated the fighting.

The Report alleges that, between January 2001 and June 2003, 'Bas-Uélé district remained under the control of ... UPDF soldiers [who] committed serious violations against all those who dared to dispute their authority or criticised their involvement in pillaging the natural resources of the region'.[105] The Report, citing the UN Special Rapporteur for Human Rights in DRC, states that the Kisangani fighting between Uganda and Rwanda was 'both economic (both armies wanted the huge wealth of Orientale Province) and political (control of the territory)'.[106]

Citing specific incidents of plundering, the Report *inter alia* states that in January 2002, UPDF troops and Hema militia opened fire on the inhabitants of Kobu village (Walendu Djatsi *collectivité*, in Djugu territory) to force away Lendu populations from near the Kilomoto gold mines.[107] Uganda supported rebel groups such as the CLM, financed a significant proportion of its war effort through taxes on exports of tea, coffee, timber and gold from Equateur and Orientale Provinces.[108] The Report generally concluded that during the second DRC conflict, Uganda financed its military expenditure with profits from natural resource exploitation in the DRC.[109] To buttress its conclusion, the Report observed that the Ugandan army enjoyed a considerably larger budget due to profits from the DRC's wealth, particularly the districts of Ituri and Haut Ulele, from 1998 to 2002.[110]

104 Para 748 Mapping Report.
105 Para 402 Mapping Report.
106 Para 748 Mapping Report.
107 Para 408 Mapping Report.
108 Para 769 Mapping Report.
109 Para 768 Mapping Report.
110 As above.

Other than UN investigations,[111] Uganda's alleged plundering of the DRC's natural wealth was also a subject of a judicial commission of inquiry in Uganda. The Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC was set up on 23 May 2002 to examine the UN Panel's allegations relating to Uganda.[112] The Commission, whilst finding that there was no Ugandan governmental policy to exploit the DRC's natural resources, found that individual Ugandan soldiers had engaged in commercial activities and looting in a purely private capacity for their personal enrichment.[113] It recommended the prosecution of several high-ranking military officers, including Brigadier Kazini who commanded Uganda's troops in the DRC. However, the government never initiated any criminal investigations or proceedings on the alleged offenders.[114]

When the ICJ discussed the issue of the illegal plunder of DRC's natural wealth by Uganda, it declared that 'officers and soldiers of the UPDF, including the most high-ranking officers, looted, plundered and exploited DRC's natural resources and that the military authorities did not take any measures to put an end to these acts'.[115] It added: 'Uganda violated its duty of vigilance by not taking adequate measures to ensure that its military forces did not engage in the looting, plundering and exploitation of the DRC natural resources.'[116] The Court in conclusion found that 'Uganda was internationally responsible for acts of looting, plundering and exploitation of the DRC's natural resources'.[117] Uganda's argument that the exploitation had been carried out for the benefit of the local population as permitted under international humanitarian law was rejected. The Court informed Uganda that it was under an obligation to make reparation to the DRC.[118]

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111 The UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (UN Panel) was set up by the Security Council in June 2000.

112 The Commission was established under Legal Notice 5 of the *Uganda Gazette* of 25 May 2001 issued by the Minister of Foreign Affairs. The Commission was composed of Justice David Porter (Chairperson); members Justice JP Berko and Mr John Rwambuya; Mr Bisereko Kyomuhendo (Secretary); and Alan Shonubi (Lead Counsel).

113 Cited in *Armed Activities on the Territory of the Congo* case (n 50 above) para 234.

114 Brigadier Kazini was killed by his girlfriend in Kampala in November 2009.

115 *Armed Activities on the Territory of the Congo* case (n 50 above) para 242.

116 *Armed Activities on the Territory of the Congo* case (n 50 above) para 246.

117 *Armed Activities on the Territory of the Congo* case (n 50 above) para 250.

118 Under general rules of international law, the Court ruled that 'any violation by a state of its international obligation generates state responsibility and, consequently, a duty to make reparation'. The Court, however, enjoined DRC and Uganda to decide on the nature, amount and the form of reparation since DRC was also found to have violated international law regarding the inviolability of diplomatic missions and personnel *à propos* Uganda's mission in Kinshasa; *Armed Activities on the Territory of the Congo* case (n 50 above) para 345 (5, 6, 13, 14). The DRC asked for $10 billion, which has been a subject of discussion between the two countries.

5 Uganda's reaction to the Mapping Report

As was noted in the introduction, Uganda officially reacted to the Mapping Report through a letter to the UN High Commissioner for Human Rights, asking that the Report be trashed. Uganda's response unfortunately did not respond to the substance of the specific allegations made against the country's military forces. It also did not respond to the allegations made against the political leaders who orchestrated the country's involvement in the DRC conflicts. Uganda's Military and Defence Spokesman, Lieutenant Colonel Felix Kulayigye (who incidentally was one time a spokesperson of Operation Safe Haven (OSH) based in Eastern DRC), dismissed the Mapping Report as 'inaccurate and in bad taste [as] the authors did not follow the rules of natural justice by giving [Uganda] a chance to defend [itself]'.[119] He thus concluded that it is 'mere speculation whose motive is only clear to the authors'.[120] Possibly, on the issue of natural justice, he has a point as the Mapping Team did not give Uganda an opportunity to respond to the allegations before the Report was drafted. In fact, *Daily Monitor* columnist Onyango Obbo termed this 'a big technical flaw'.[121] This may well be true; however, the named countries, Angola, Burundi, Rwanda and Uganda, were given an opportunity to respond to the Report before it was published, which they did.[122] Moreover, the Mapping Report, for example, quotes findings made by Uganda's own instituted commission as regards the issue of the illegal plunder of DRC's natural wealth.

As was noted in the introduction, Kulayigye and Uganda's response to the report also failed to point out the 'inaccuracies' in the Mapping Report. Even after the publication of the Report, one would have expected the government of Uganda to put the record straight, but it did not. One is therefore left wondering what the 'accurate record' is according to Uganda.

From the above exposition, it can clearly be seen that the allegations made against Uganda by the Mapping Team are supported by corroborating evidence by NGOs, the African Commission and the International Court of Justice. Uganda itself instituted a commission of inquiry into the illegal plunder of DRC wealth, whose report is extensively quoted by the Mapping Report. Nevertheless, it seems that when

119 'UN report pins Uganda on Congo' *Daily Monitor* 1 October 2010 http://www.monitor.co.ug/News/National/-/688334/1021752/-/cn40clz/-/index.html (accessed 23 November 2011).

120 As above.

121 'Kampala, Kigali "ate" in old world order, eating in new one too' *Daily Monitor* 6 October 2010 http://www.monitor.co.ug/OpEd/OpEdColumnists/CharlesOnyangoObbo/-/878504/1026812/-/glcoe9/-/index.html (accessed 6 October 2010).

122 Their full responses can be found at http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/ RDCProjectMapping.aspx (accessed 23 October 2011).

it comes to issues of state accountability for international crimes, denial is the rule and not the exception.

According to Uganda's bi-weekly newspaper *The Observer*, in reaction to the Mapping Report, Uganda threatened to withdraw its soldiers from peacekeeping operations in Somalia.[123] From Uganda's official response one can clearly detect an attempt to blackmail the UN. In fact, Foreign Minister Kutesa was quoted as saying that 'the report released by the UN will interfere about (*sic*) the peacekeeping process done by Uganda soldiers ... externally it may lead us to remove our troops from the chaotic country [Somalia]'.[124] Currently, Uganda has troops serving in the AMISOM, thus it can afford to blackmail the UN since many Western countries are reluctant to commit troops there, *The Observer* posited. This may well be true, as President Museveni has been at the forefront of calling for the increase in troop numbers serving under AMISOM in the aftermath of the 11 July 2010 bombings which were claimed by the Somalia *al-Shabab* militant group.[125] In fact, he has even pledged that he is ready to provide all the required troops (20 000) for AMISOM.[126] He could be doing this well knowing that by making such a gesture, the UN would never go after his soldiers' indiscretions in the DRC conflicts.

The stance taken by Uganda can be compared to that taken by Rwanda on the Mapping Report. Regarding Rwanda, President Kagame dismissed the Report as 'absurd'.[127] The Report *inter alia* gives a detailed inventory of instances where Hutu refugees were rounded up by Rwandan forces on the pretext of repatriation before they were executed. The Report generally documents incidents of war crimes, crimes against humanity and genocide which were committed by Rwandan troops when the country intervened in the then Zaïre and later on the DRC. When the draft of the Report was first leaked before publication, Rwanda threatened to withdraw its UN peacekeeping troops from Sudan.[128] Rwanda has 3 300 soldiers serving under UNAMID and 256 soldiers serving in UNMIS. Rwanda accused the UN of trying to deflect

123 'UN backs down under Uganda, Rwanda pressure' *The Observer* 3 October 2010 http://www.observer.ug/index.php?option=com_content&task=view&id=10386&Itemid=59 (accessed 5 October 2010).

124 'Somalia: Uganda vows to remove their soldiers' *Garowe Online* 3 October 2010 http://www.garoweonline.com/artman2/publish/Somalia_27/Uganda_Vows_to_remove_their_soldiers_in_Somalia_printer.shtml (accessed 5 October 2010).

125 'United Nations blocks change of AMISOM mandate' *Daily Monitor* 28 July 2010 http://www.monitor.co.ug/News/National/-/688334/966154/-/x2o9ru/-/index.html (accessed 5 October 2010).

126 '*Al-shabab* terrorists lose key sites' *The New Vision* 4 October 2010 http://www.newvision.co.ug/D/8/12/734067 (accessed 5 October 2010).

127 'UN Publish report as Uganda, Rwanda & Burundi deny accusation' *Africa News* 2 October 2010 available at http://www.africanews.com/site/list_message/30746 (accessed 30 September 2010).

128 'Peacekeepers on standby for pull-out – Mushikiwabo' *The New Times* 1 September 2010 http://allafrica.com/stories/201009010009.html (accessed 5 October 2010).

attention from its own failures when it failed to stop the Rwandan genocide of 1994. After these threats, the UN Secretary-General, Ban Ki Moon, rushed to Kigali 'to speak directly with the Rwandan President and other government officials about their concern' regarding the report.[129] After the talks, assurances were given that Rwanda would not withdraw from UN peacekeeping,[130] while the UN announced that the publication of the Report would be pushed to October, to allow concerned states time to comment on its findings.

One year after the publication of the Report, not much has been heard on the steps being taken to address the issues it raised. In this connection, Levi Ochieng, one time Great Lakes region analyst for the International Crisis Group, has questioned the whole purpose of producing the report by positing that the UN Secretary-General 'shot down the report by meeting the key accused and trying to politically appease their egos'.[131] To him, this further exposed the incompetence of the UN. This observation may well be correct, considering the fact that nothing has been done so far on the findings of the Report.

6 Conclusion

The Mapping Report was published much to the chagrin and anger of the countries that are named therein, including Uganda. The Report made very serious allegations against the Ugandan army as having perpetrated crimes that may very well amount to war crimes, crimes against humanity and genocide. Whilst Uganda sought the trashing of the Report, it failed to respond to the specific allegations levelled against its agents; allegations, as was indicated above, which are corroborated by institutions such as the ICJ. From the official Uganda response to the Report, one may easily conclude that Uganda is guilty of the charges against it. The Mapping Report cites Uganda's own findings of its involvement in the DRC and thus, rather than reaching a blanket conclusion that the Report is devoid of any substance, Uganda should have moved to investigate and institute criminal charges against those who are suspected to have committed the alleged crimes. Suffice it to note that the Judicial Commission of Inquiry, established to investigate allegations of the illegal plunder of DRC's natural wealth by Ugandans, made recommendations to those responsible in 2002

129 'Ban arrives in Rwanda to discuss upcoming report on rights violations' *UN News Service* 7 September 2010 http://www.un.org/apps/news/story.asp?NewsID=35852&Cr=democratic&Cr1= congo (accessed 5 October 2010).

130 According to the anonymous reviewer of this article, former British Prime Minister Tony Blair put pressure on President Kagame to change his mind on withdrawing Rwandan troops from UN peacekeeping.

131 Personal communication with Levi Ochieng by e-mail, 2 October 2010.

but they have not been acted upon. Thus, the time may have come to revisit the issue.

Second, the allegations of the UPDF committing odious crimes in the DRC conflict dent the image of a professional force. The government of President Museveni prides itself of building a modern, professional and disciplined army in the name of the UPDF. However, this image has been shattered by the allegations of committing atrocities in the DRC. Moreover, there are still lingering allegations that the UPDF committed crimes during the war in Northern Uganda for which it is yet to answer.

Thirdly, and connected to the second point, is the fact that the professionalism of the UPDF may just as well be a facade. The National Resistance Army (NRA), the predecessor of the UPDF, was full of child soldiers (called *kadogos*) who fought with Museveni before he came to power. At the time, when he was confronted with accusations of using children to fight his war, Museveni argued that, first, the children had joined his army for their own protection and, secondly, that in African culture children are allowed to use weapons.[132] So, the recruitment of child soldiers during the DRC conflict by the UPDF should not surprise anyone. It was a continuation of Uganda army's tradition. In addition, the UPDF has over the years suffered from the phenomenon of ghost soldiers,[133] which entails over-estimating the strength of the army so that the commanders benefit from the remuneration of the non-existent troops. The recruitment of child soldiers, therefore, served the purpose of plugging the shortfall in troop numbers.

Lastly, when the Report was first published, human rights organisations fell over each other demanding that the countries named be brought to book. However, this never happened. According to Obbo:[134]

> The fact that [there were] no strong calls that the report be tabled [at] the UN Security Council for debate, [showed] that there are more important causes which draw more passion than human rights.

Apparently similar sentiments were expressed by Reyntjens, who observed that '*realpolitik* will let perpetrators escape prosecution and punishment'.[135] One year after the publication of the Report, this is exactly what appears to have happened.

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132 See 'Museveni and child soldiers' (video) http://www.youtube.com/watch?v=uplTVcXw_Gk (accessed 10 October 2010).

133 See eg, 'How UPDF ghosts were created' *The Independent* 10 September 2008 http://www.independent.co.ug/reports/intelligence-file/169-how-updf-ghosts-were-created (accessed 23 November 2011).

134 C Onyango-Obbo in 'Kampala, Kigali "ate" in old world order, eating in new one too' (n 121) above.

135 F Reyntjens 'The UN report on Congo's atrocities: The end of impunity?' *International Justice Tribune* 5 October 2010 http://www.rnw.nl/international-justice/article/un-report-congos-atrocities-end-impunity (accessed 6 October 2010).

AFRICAN HUMAN RIGHTS LAW JOURNAL

Prosecuting the President of Sudan: A dispute between the African Union and the International Criminal Court

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Summary

The indictment of the President of Sudan has provoked negative responses from the African Union, including a resolution that instructed member states of the AU not to co-operate with the ICC in arresting the President and surrendering him for trial in the ICC. The AU relied on article 98(2) of the ICC Statute in terms of which the ICC may not proceed with a request for surrender that would require a state to act inconsistently with its obligations under international law with respect to the sovereign immunity of, inter alia, *heads of state. However, it has been decided that under the rules of international law, sovereign immunity applies only to prosecutions in national courts and not to prosecutions in an international tribunal, and article 27(2) of the ICC Statute accordingly provides that sovereign immunity shall not bar the ICC from exercising jurisdiction over persons enjoying such immunity. It is argued in this article that article 98(2) contradicts article 27(2): If a head of state does not enjoy immunity against prosecution in the ICC, there is no immunity to be waived by the national state. A pre-trial chamber of the ICC did not base the obligation of state parties (Kenya and Chad) to arrest and surrender the Sudanese President for prosecution in the ICC on the provisions of article 27, but on the fact that the situation in Sudan was referred to the ICC by the*

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Security Council of the United Nations and a passage in the Security Council resolution calling on Sudan and all other parties to the conflict in Darfur to co-operate fully in bringing the President of Sudan to justice. The exact implications of article 98(2) therefore remain unresolved.

1 Introduction

On 4 March 2009, a pre-trial chamber of the International Criminal Court (ICC) issued a warrant for the arrest of Sudanese President Omar Hassan Ahmed Al Bashir to stand trial in the ICC on several charges based on crimes against humanity (murder, extermination, rape, torture and forcible transfer) and war crimes (intentionally directing attacks against the civilian population or individual civilians, and pillage) committed in Darfur.[1] Charges based on the crime of genocide were subsequently included in the warrant for his arrest.[2] The situation in Darfur was referred to the ICC by the Security Council of the United Nations (UN).[3]

The African Union (AU) did not take kindly to the indictment of President Al Bashir. A meeting of the AU held in July 2009 endorsed a decision of the African state parties to the Rome Statute of the International Criminal Court which proclaimed that 'the AU member states shall not co-operate pursuant to the provisions of article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan'.[4] At the Review Conference of the ICC held in Kampala, Uganda, from 31 May to 11 June 2010, Malawi, speaking in its capacity as chair of the AU, stated that the indictment of heads of state could jeopardise effective co-operation with the ICC. Basic to the position taken by the African state parties was article 98(1) of the Statute of the International Criminal Court (ICC Statute), which provides:[5]

> The Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the co-operation of that third state for the waiver of the immunity.

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1 *Prosecutor v Omar Al Bashir (Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir)* Case ICC-02/05-01/09-3 (4 March 2009).

2 *Prosecutor v Omar Hassan Ahmad Al Bashir (Second Warrant of Arrest for Omar Hassan Ahmed Al Bashir)* Case ICC-02/05-01/09-59 (21 July 2009).

3 SC Res 1593 (2005) of 31 March 2005, UN Doc S/RES/1593 (2005).

4 Decision of the Meeting of African State Parties to the Rome Statute of the International Criminal Court, UN Doc Assembly/AU/13(XIII) (3 July 2009) para 10.

5 Art 98(1) Statute of the International Criminal Court, UN Doc A/CONF 183/9 (17 July 1998) as corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 Jan 2002 (ICC Statute).

Since the accused is a sitting head of state and as such enjoys sovereign immunity from prosecution for any criminal offence, state parties of the ICC – according to the AU – cannot be required to surrender him for trial in the ICC without the consent of Sudan (a non-party state). Earlier, member states of the European Union stated in similar vein that their implementation legislation would not allow them to arrest and surrender President Al Bashir to stand trial in the ICC, and Denmark actually invited President Al Bashir to the international conference on climate change that was held in Copenhagen from 7 to 18 December 2009.[6]

The ICC's Rules of Procedure and Evidence confirm that the Court cannot, without the permission of the sending state, insist on the surrender to the Court of a person enjoying sovereign immunity.[7] In terms of the ICC Statute, the Court must first 'obtain the co-operation of the sending state for the giving of consent for the surrender',[8] and the Rules of Procedure and Evidence place an obligation on the requested state to provide information to the ICC that would assist it in seeking such consent.[9] Any other state may (not must) provide additional information to assist the Court in securing the surrender of the person to the Court in conformity with the rules of international law.[10]

The views expressed by the AU regarding the significance of sovereign immunity of the Sudanese President, as we shall see, were not supported by many analysts or by the ICC itself. They insisted that state parties are without further ado legally obliged to arrest and to surrender President Al Bashir for trial in the ICC, apparently basing their position on article 27 of the ICC Statute, which provides:[11]

> 1 The Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2 Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such person.

6 See D Akande 'Denmark invited Sudanese President Bashir to Climate Change Conference' *EJIL Talk* 19 November 2009 http://www.ejiltalk.org/denmark-invited-sudanese-president-bashir-to-climate-change-conference (accessed 31 July 2011).

7 Rules of Procedure and Evidence Rule 195(2) Official Records of the Assembly of State Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 September 2002, Part IIA (2002) (RPE).

8 Art 98(2) ICC Statute.

9 Rule 195(1) RPE (n 7 above).

10 As above.

11 Art 27 ICC Statute.

2 Factual basis of the dispute

In July 2010 Chad hosted President Al Bashir at a summit of the Sahel-Saharan states held in N'Djamena, thereby becoming the first state party to the ICC Statute to harbour 'knowingly and willingly a fugitive ... wanted by the Court' – for which it was severely criticised by No Peace Without Justice.[12] The reprimand was based on the assumption that Chad, as a state party to the ICC Statute, was obliged to arrest a person against whom the ICC had issued an arrest warrant without first having to obtain the co-operation of Sudan.

President Al Bashir was subsequently also hosted, on two occasions, by the Republic of Kenya, also a state party to the ICC Statute: in August 2010 as a guest of the Kenyan government at a function to celebrate the signing of Kenya's new Constitution; and thereafter again as a participant in a summit for Inter-Governmental Authority for Development that was held in Nairobi on 30 October 2010 to discuss the forthcoming referendum for the secession from Sudan of the southern region of that country.

The ICC entered into discussions with Kenyan officials regarding that country's failure to arrest President Al Bashir. At a meeting between the President of the ICC's Assembly of State Parties, Ambassador Christian Wenaweser of Liechtenstein and the Minister of Foreign Affairs of the Republic of Kenya, which took place in New York on 17 September 2010 – that is, after the Sudanese President's first visit to Kenya – the Minister explained his government's refusal to execute the arrest warrant in view of 'his country's competing obligations toward the Court, the African Union, and regional peace and stability'.[13] On 2 July 2011, the African Union stated in similar vein that the indictment of President Moammar Gadhafi to stand trial in the ICC 'seriously complicates' the AU's efforts to broker a settlement in the Libyan civil war and decided that its 'member states shall not co-operate in the execution of the arrest warrant'.[14]

Whereas Chad and Kenya interpreted the 'conflict' between articles 27(2) and 98(1) as affording preference to sovereign immunity of a head of state over a request for surrender of a person to stand trial in the ICC, a pre-trial chamber of the ICC took the opposite view. It from the outset maintained 'that the current position of Omar Al Bashir as head of a state which is not a party to the [ICC] Statute, has no

12 No peace without justice, International Criminal Justice Programme 'NPWJ calls on ICC and state parties to respond strongly to Chad=s failure to arrest President Bashir of Sudan' http://www.npwj.org/ICC/NPWJ-calls-ICC-and-States-Parties-respond-strongly-Chad=s-failure-arrest-President-Bashir-Sudan (accessed 31 July 2011).

13 ICC Press Release of 21 September 2010 'President of the Assembly of States Parties meets Minister of Foreign Affairs of Kenya' Doc ICC-ASP-20100921-PR575.

14 Decision on the Implementation of the Assembly Decisions on the International Criminal Court Doc EX.CL/670 (XIX) para 6.

effect on the Court's jurisdiction over the present case'.[15] The pre-trial chamber, when granting the application for an arrest warrant against President al-Bashir, decided that Sudan, though not a state party to the ICC Statute, 'has the obligation to fully co-operate with the Court',[16] and in its final decision ordered that 'a request for co-operation seeking the arrest and surrender of Amar Al Bashir' be transmitted to all state parties to the ICC Statute and to all members of the Security Council of the United Nations.[17] On 25 October 2010, when President Al Bashir's second visit of 30 August to Kenya was pending, a pre-trial chamber requested Kenya to report to the chamber, no later than 29 October, about any problem that would impede or prevent his arrest and surrender when he visits the country.[18]

The pre-trial chamber thereby 'appears to have considered that the President of Sudan did not benefit from any immunity at international law under the circumstances, that therefore state parties would not find themselves confronted with conflicting obligations, and that consequently article 98(1) found no application'.[19] The Court's reasoning seems to be that sovereign immunity applies to prosecutions of heads of state and certain other high-ranking government officials in national courts only, and does not apply to prosecutions in international tribunals.

3 Sovereign immunity in international law

Article 98(1) was seemingly designed to uphold the rules of international law pertaining to jurisdictional immunity of foreign states and diplomats and the immunity from execution of the property of a foreign state.[20] According to Rinoldi, it 'clashes with the spirit of the Statute and ... with article 27(2)', which discard immunities and special procedural rules that may attach to the official capacity of a person indicted to stand trial in the ICC.[21]

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15 *Prosecutor v Omar Al Bashir* (n 1 above) para 41.

16 n 1 above, para 241.

17 n 1 above, para 93.

18 ICC Press Release of 26 October 2010, UN Doc ICC-CPI-20101026-PR589.

19 WA Schabas *The International Criminal Court: A commentary on the Rome Statute* (2010) 1042.

20 K Prost & A Schlunck 'Co-operation with respect to waiver of immunity and consent to surrender' in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 1131. As to those immunities, see the Vienna Convention on Diplomatic Relations 1961 UN Doc A/Conf 20/13 (16 April 1961).

21 D Rinoldi & N Parisi 'International co-operation and judicial assistance between the International Criminal Court and states parties' in F Lattanzi & WA Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* (1999) 339 389; and see also P Saland 'International criminal law principles' in RS Lee (ed) *The International Criminal Court: The making of the Rome Statute: Issues, negotiations, results* (1999) 189 202 (observing that there seems to be a contradiction between the two articles, 'at

Triffterer observed that making the surrender of an official of a non-party state enjoying sovereign immunity dependent upon a waiver of that immunity by the non-party state concerned could in practice (citing the exact wording of article 27(2)) 'bar the Court from exercising its jurisdiction over such a person', since the ICC Statute does not permit trials *in absentia*.[22] That might well be the case, because non-party states cannot be compelled to co-operate with the Court, and co-operation evidently includes the waiver by a government of sovereign immunity of its officials. However, leaving aside for the moment the implications of article 27(2), immunity in respect of crimes within the jurisdiction of the ICC will terminate when the official vacates the office that afforded him or her such protection, and if he or she should then enter the territory of a state party, that state party will in any event be entitled, and indeed obliged, to arrest that person and surrender him or her for prosecution in the ICC. The problem attending the arrest and surrender of President Al Bashir is slightly different. Although Sudan, being a non-party state, cannot be compelled to surrender its President to stand trial in the ICC, the question here is whether a state party such as Chad and Kenya were obliged to arrest the Sudanese President when he set foot in their respective countries.

The judgment of the British House of Lords in the case against Augusto Pinochet[23] is authority for the proposition that a head of state enjoys complete immunity from criminal prosecution (and from civil liability) while he or she remains in office (immunity *ratione personae*),[24] but after having vacated that office, only remains immune from prosecution for crimes committed while he or she occupied that office if these crimes were committed in his or her official capacity (immunity *ratione materiae*).[25]

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least if "the third State" mentioned in article 98 is interpreted to not only a non-party state but also a party to the Rome Statute'); P Gaeta 'Official capacity and immunities' in A Cassese *et al* (eds) *The Rome Statute of the International Criminal Court: A commentary* (2002) 975 986 (referring to 'a problem of co-ordination of arts 98(1) and 27(2)').

22 O Triffterer 'Irrelevance of official capacity' in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 501 513; and see also Gaeta (n 21 above) 992.

23 *R v Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte (Amnesty International & Others Intervening) (No 3)* [1999] 2 All ER 97; and for an overview of the court=s decision in regard to sovereign immunity, see S Wirth 'Immunities, related problems, and article 98 of the Rome Statute' (2001) 12 *Criminal Law Forum* 429 434-439.

24 See *Siderman De Blake v Republic of Argentina* 965 F 2d 699 718-19 (9th Cir 1992); *LaFontant v Aristide* 844 F Supp 128 131-32 (EDNY 1994).

25 *Hatch v Baez* 14 S Ct Rep New York (7 Hun 596) 600 (1876); 5 American International Law Cases (1873-1968) 434 435 (1876) (official acts of a former president of the Dominican Republic); and see also A Watts 'The legal position in international law of heads of states, heads of government and foreign ministers' (1994-III) 247 *Recueil des cours* 19 88-89; R Jennings & A Watts (eds) *Oppenheim's international law* (1992) para 456.

Although criminal conduct is not for purposes of immunity *ratione materiae* precluded from the range of official acts of a head of state,[26] it seems self-evident that conduct which constitutes customary law offences will never qualify as part of the official functions of a head of state.[27] That, at least, is the policy position reflected in the ICC Statute, and in this respect the ICC Statute does not deviate from the existing rules of customary international law.[28] The International Criminal Tribunal for the former Yugoslavia (ICTY) has decided accordingly that under customary international law individual persons may be held liable for the war crime of torture 'whatever their official position, even if they are heads of state or government ministers'.[29]

In the *Arrest Warrant* case, the International Court of Justice (ICJ) endorsed the principle, as a norm of customary international law, that immunity from prosecution does not mean impunity in respect of the crime committed:[30]

> Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

The ICJ thus distinguished between criminal responsibility and jurisdictional immunity and went on to specify circumstances in which immunities enjoyed by certain public officials under international law would not bar a criminal prosecution:

- The beneficiaries of criminal immunity do not enjoy that immunity under international law in their own countries, and may therefore

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26 *Marcos & Marcos v Federal Department of Police* (1990) 102 *International Law Reports* 198 203-204 (Switzerland Federal Tribunal) (2 November 1989).

27 *In re Goering & Others* (1946) 13 *International Law Reports* 203 221 (noting that sovereign immunity does not apply to 'acts condemned as criminal by international law'); *Democratic Republic of Congo v Belgium* 2002 ICJ 3, dissenting judgment of Van den Wyngaert J para 36 (14 February 2002) (noting that war crimes and crimes against humanity will never be part of official duties); and see also D Akande & S Shah 'Immunities of state officials, international crimes, and foreign domestic courts' (2011) *European Journal of International Law* 815 (agreeing that international crimes will not come within the reach of immunity *ratione materiae*, but basing that conclusion not on the *jus cogens* disposition of the norms rendering the conduct criminal or on the assumption that international criminal conduct cannot form part of official acts, but rather on the jurisdiction conferred on municipal courts).

28 G Palmisano 'The ICC and third states' in Lattanzi & Schabas (n 21 above) 391 410; and see A Bianchi 'Immunity versus human rights: The *Pinochet* case' (1999) 10 *European Journal of International Law* 237 259-60 (noting that considerable support can be drawn from state practice in support of the proposition that individuals can be held responsible for international crimes regardless of their official position); GM Danilenko 'ICC jurisdiction and third states' in Cassese *et al* (n 21 above) 1871 1881 (noting that one cannot claim immunity for *ius cogens* crimes).

29 *Prosecutor v Anto Furund iya* Case IT-95-I-T para 140 (10 December 1998).

30 *Democratic Republic of Congo v Belgium* 2002 ICJ 3 (14 February 2002) para 60.

be brought to trial in the courts of those countries in accordance with the relevant rules of domestic law.[31]

- The persons entitled to sovereign immunity will forfeit the immunity from foreign jurisdiction if the state which they represent or have represented has decided to waive that immunity (the immunity vests in the state and not in the state official).
- The immunities accorded by international law will not preclude prosecutions in other states for crimes committed prior or subsequent to his or her period of office, as well as for acts committed in his or her personal capacity while in office, after the person concerned ceases to hold the office to which that immunity was attached.
- The official concerned may be subject to criminal prosecution in certain international criminal courts such as the ICC.[32]

This latter cautious assessment was given definitive substance by the Appeals Chamber of the Special Court for Sierra Leone in the case against Charles Taylor.[33] Taylor, a former President of neighbouring Liberia, claimed sovereign immunity. The Court noted that the above decision of the ICJ affording sovereign immunity to the minister of foreign affairs of the Democratic Republic of the Congo applied to prosecutions of an official of state A in state B; that the Special Tribunal for Sierra Leone is not a national court of Sierra Leone but an international criminal court;[34] and that the principle of sovereign immunity 'derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community'.[35]

A distinction must accordingly be made between prosecutions of state officials in the national courts of a foreign state, on the one hand, and prosecutions of state officials in an international tribunal on the other. Upholding this distinction for purposes of safeguarding heads of state (and ministers of foreign affairs) against prosecution in national courts for core international crimes has indeed been severely criticised. As noted by Judge Van den Wyngaert in her dissenting opinion in the *Arrest Warrant* case, '[i]mmunity should never apply to crimes under international law, neither before international courts nor national courts'.[36] The South African implementation legislation of the ICC Statute provides in similar vein that a person who '[i]s or was a head of state or government, a member of a government or parliament, an

31 See also Prost & Schlunck (n 20 above) 1132.

32 *Democratic Republic of Congo v Belgium* (n 30 above) para 61.

33 *Prosecutor v Taylor* 128 *International Law Reports* 239 (31 May 2004).

34 *Democratic Republic of Congo v Belgium* (n 30 above) para 42.

35 *Democratic Republic of Congo v Belgium* (n 30 above) para 51.

36 Dissenting judgment of Van den Wyngaert J (n 27 above) para 36; and see also J Dugard & G Abraham 'Public international law' (2002) *Annual Survey of South African Law* 140 165-166.

elected representative or a government official' can be prosecuted in a South African court for crimes within the subject matter jurisdiction of the ICC, '[d]espite any other law to the contrary, including customary and conventional international law'.[37]

Nevertheless, the rules relating to sovereign immunity articulated in the *Pinochet* case and in the *Arrest Warrant* case apply to prosecutions in a national court. An *obiter dictum* in the *Arrest Warrant* case and the *ratio decidendi* of *Prosecutor v Charles Taylor* made it abundantly clear that a head of state (and minister of foreign affairs) do not possess sovereign immunity against prosecutions in an international tribunal. Consequently, if a head of state does not enjoy immunity from prosecution in the ICC, there are – in the words of article 98(1) – no 'obligations under international law with respect to the state or diplomatic immunity of a person' to be waived. Article 27 of the ICC Statute endorsed this state of the law.

4 Redundancy of article 98(1)

The rule of customary international law proclaiming that sovereign immunity does not apply to prosecutions in the ICC renders the provisions of article 98(1) totally redundant; and well-established rules of statutory interpretation sanction a presumption against a finding of redundancy of any words or phrases in – let alone an entire subsection of – a written legal instrument with the force of law.[38] This raises the question how one could possibly reconcile article 98(1) with the dictates of article 27.

Akande proposes that the tension between articles 27 and 98 may be resolved by confining article 27(2) to state party officials and making the provisions of article 98 applicable to state officials of non-party states.[39] Other analysts have sought to bridge the gap by distinguishing between, on the one hand, the competence of the ICC to prosecute and inflict punishment on the beneficiary of sovereign immunity, despite his or her official capacity, if and when he or she is surrendered to the Court, and, on the other, the duty of a state party to surrender that

37 Sec 4(2)(a) Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

38 The presumption is encapsulated in the maxim *verba accipienda ut sortiantur affectum* (words are to be construed in such a way that they have some [legal] effect).

39 D Akande 'The legal nature of Security Council referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333 339.

person to stand trial in the ICC.[40] The only possible relevance of article 98(1) would then relate to the duty of a state party to surrender a foreign state official to the ICC for prosecution in that Court if this would violate an obligation of the state party under the rules of immunity and privileges of international law.[41] Under the rules of international law, the custodial state can request the government of the accused to waive the immunity or privilege of, for example, its head of state or a member of that government's diplomatic corps; and if that were to happen, the suspect may be surrendered for trial in the ICC.

The person to be prosecuted can, of course, also voluntarily surrender him- or herself to stand trial in the ICC.[42] This happened, for example, in the case against Bahar Idriss Abu Garda, Chairperson and General Co-ordinator of Military Operations of the United Resistance Movement in Darfur. The charges in this case were based on an attack carried out on 29 September 2007 against an AU peace-keeping mission at the Haskanita Military Group Site in North Darfur. A pre-trial chamber of the ICC on 7 May 2009 issued a summons to appear (not an arrest warrant) against Abu Garda, he voluntarily appeared before the pre-trial chamber on 18 May 2009, and on 8 February 2010 the pre-trial chamber declined to confirm the charges against him.[43] It should be noted that the indictment of Mr Abu Garda did not in any way involve sovereign immunity, but does show that persons suspected of international wrongdoing might consider it in their best interest to have their day in court.

Attempts to afford empirical relevance to article 98(1) along the lines suggested above will have the effect of rendering article 27 redundant, which again is not to be presumed. And, since article 27 is based on a sound norm of customary international law (proclaiming that sovereign immunity does not apply to prosecutions in international tribunals), the balance between upholding the practical sustainability of either

40 See eg A Dworkin & K Iliopoulis 'The ICC, Bashir, and the immunity of heads of state' *Crimes of war* 3 http://www.crimesofwar.org/commentary/the-ICC-bashir-and-the-immunity-of-heads-of-state/ (accessed 31 October 2011) (stating that state parties must respect the immunity of officials of non-party states and can only be compelled to surrender officials of another state party); and see also Palmisano (n 28 above) 410; D Robinson 'The Rome Statute and its impact on national law' in Cassese *et al* (n 21 above) 2; M du Plessis 'International criminal courts, the International Criminal Court, and South Africa's implementation of the Rome Statute' in J Dugard *International law: A South African perspective* (2005) 174 209 n 193.

41 See Prost & Schlunck (n 20 above) 1132.

42 LN Sadat *The International Criminal Court and the transformation of international law: Justice for the new millennium* (2002) 202-203 (also mentioning the possibility that the perpetrator can be brought before the ICC without, or independent of, the court=s request); and see also Triffterer (n 22 above) 513; Gaeta (n 21 above) 994.

43 *Prosecutor v Bahar Idriss Abu Garda (Decision on the Confirmation of Charges)* Case ICC-02/05-02/09-243-Conf (8 February 2010). Application by the prosecutor for leave to appeal that decision was refused; *Prosecutor v Bahar Idriss Abu Garda (Decision on the Prosecutor's Application for Leave to Appeal the Decisions on the Confirmation of Charges)* Case ICC-02/05-02/09-267 (23 April 2010).

the one or the other provision in the ICC Statute therefore clearly leans toward favouring article 27.

Saland notes the obvious: Article 98(1) was not properly co-ordinated with article 27 of the ICC Statute.[44] This should come as no surprise, since the two provisions were drafted by different working groups (article 27 by the Working Group on General Principles of Criminal Law and article 98 by the Working Group on Co-operation and Judicial Assistance) and, given the time constraints under which the drafters had to complete their mandate in Rome, proper co-ordination of all the provisions in the ICC Statute was not always practically possible. And so, difficult choices have to be made.

Those choices should clearly favour the general principles of criminal justice reflected in Part 3 of the ICC Statute and which include article 27. Article 98(1) indeed exemplified the sensitivity of the drafters to upholding international law principles centred upon state sovereignty, which was designed to secure 'that no obstacle or impediment is set to the exercise of ... official functions'.[45] However, customary international law restricted sovereign immunity to prosecutions in national courts, and article 27 endorsed that salient norm of customary international law.

5 Complementarity concerns

However, there is one further matter that might influence one's preferences in this regard. Upholding article 27 does implicate the principle of complementarity, which has come to be recognised as perhaps the most basic component of prosecutions in the ICC. The tenth paragraph of the Preamble to the ICC Statute proclaims that 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'. Article 1 of the ICC Statute mentions the principle of complementarity as one of the cornerstones of the ICC regime.[46] Article 17 lays down rules of admissibility of cases to be applied by the ICC, based on the principle of complementarity. The point to be emphasised is that the competence to bring the perpetrator(s) of crimes within the jurisdiction of the ICC to justice remains the prime responsibility of national states.[47] The principle of complementarity thus reflects 'deference to the interests of principally-

44 Saland (n 21 above) 189 205 n 25; and see also Akande (n 39 above) 337.

45 Gaeta (n 21 above) 986.

46 Art 1 ICC Statute; and see B Swart & G Sluiter 'The International Criminal Court and international criminal co-operation' in HAM von Hebel *et al* (eds) *Reflections on the International Criminal Court: Essays in honour of Adriaan Bos* (1999) 91 105.

47 P Benvenuti 'Complementarity of the International Criminal Court to national criminal jurisdictions' in Lattanzi & Schabas (n 21 above) 21 22 23-25 29 39.

affected states'.[48] Its underlying premise was 'to ensure that the Court did not interfere with national investigations or prosecutions except in the most obvious cases'.[49]

Complementarity thus recognises the evident fact that national states are ideally more suited and practically better equipped to bring the perpetrators of crimes, including international crimes, to justice.[50] At the Review Conference in Kampala, the delegates adopted by general agreement a resolution emphasising the importance of what came to be known as 'positive complementarity'[51] and which had been defined by the Assembly of State Parties as[52]

> all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for states, to assist each other on a voluntary basis.

The resolution on complementarity adopted by the Review Conference recognised 'the desirability for states to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level'.[53]

The problem, then, is this: Under the rules of customary international law, state parties are not permitted to prosecute in their municipal courts a foreign national who can claim sovereign immunity, unless the foreign state agrees to forfeit the immunity of the person concerned; yet state parties are in virtue of article 27 under a duty to arrest that foreign national if he or she were to set foot in their national territory and surrender him or her to the ICC to be prosecuted for a crime

48 M Morris 'Complementarity and conflict: States, victims, and the ICC' in SB Sewall & C Kaysen (eds) *The United States and the International Criminal Court* (2000) 195 197; and see also A Dieng 'International Criminal Court: From paper to practice – Contribution from the International Criminal Court for Rwanda to the establishment of the International Criminal Court' (2002) 25 *Fordham International Law Journal* 688 697; JT Holmes 'Complementarity: National courts versus the ICC' in Cassese *et al* (n 21 above) 1.

49 Holmes (n 48 above) 675.

50 Sadat (n 42 above) 114; JE Alvarez 'Crimes of states/Crimes of hate' (1999) 24 *Yale Journal of International Law* 365 476-78; Holmes (n 48 above) 673.

51 Res ICC-ASP/RC/Res 1 (8 June 2010).

52 Resolutions Adopted by the Assembly of State Parties, Annex IV, Appendix, para 16 Assembly of State Parties to the Rome Statute of the International Criminal Court, Resumed Eighth Session, New York, 22-25 March 2010, UN Doc ICC-ASP/8/20/Add 1 24; and see also WW Burke-White 'Proactive complementarity. The International Criminal Court and national courts in the Rome system of international justice' (2008) 49 *Harvard International Law Journal* 53 54 (appealing to the ICC to 'participate more directly in efforts to encourage national governments to prosecute international crimes themselves').

53 Res ICC-ASP/RC/Res 1 (n 51 above) para 8.

within the jurisdiction of the ICC. Implementation of the principle of complementarity is therefore precluded by this state of affairs.[54]

It is submitted, though, that positive complementarity places a special burden on state parties with a special interest in bringing a foreign head of state or other state official to justice to canvass consent of the state in which the sovereign immunity of the suspect is vested so that it can exercise its complementarity jurisdiction; and if that state cannot succeed in obtaining such consent, then prosecution in the ICC remains the only alternative. In the case of President Al Bashir, complementarity concerns applying to state parties are in any event of academic interest only, since the crimes of which the Sudanese President is accused occurred in his own country and the alleged victims shared his nationality. There are no states other than Sudan that can claim a special interest in the matter based on the jurisdictional principle of territoriality or active nationality. Sudan itself and the ICC seem to be the only alternative prosecuting forums, and sovereign immunity of President Al Bashir does not apply to prosecutions in either Sudan or the ICC. Under the rules of complementarity, Sudan remains entitled to challenge proceedings in the ICC against its president by merely conducting a *bona fide* investigation into the allegations of his wrongdoing.[55]

6 ICC's reasoning

Efforts to avoid the redundancy of article 98(1) have prompted some analysts to base the duty of states to arrest and surrender President Al Bashir for trial in the ICC on grounds other than the dictates of article 27, notably on the fact that the situation in Darfur was referred to the ICC by the Security Council.[56] It must be emphasised, though, that in ICC matters the Security Council only has those powers entrusted to it by the ICC Statute; it cannot instruct the ICC to exercise jurisdiction over offences not included in the subject matter jurisdiction of the Court, or to prosecute persons not subject to the jurisdiction *ratione personae* of the Court. By the same token, it cannot issue orders for the ICC to conduct a trial, in violation of the principle of complementarity, in instances where the national court with a special interest in the matter is willing and able to bring the suspect to justice. In this respect, the ICC differs radically from the *ad hoc* tribunals (the ICTY and the International Criminal Tribunal for Rwanda (ICTR)) that were created by, and as organs of, the Security Council. Nothing, though, would

54 See Dissenting Judgment of Van den Wyngaert J (n 27 above) para 37.

55 Art 19 read with art 17 ICC Statute.

56 See eg Dworkin & Iliopoulis (n 40 above) 3-4 (stating that 'in referring the situation in Darfur to the ICC, [the Security Council] imposed on Sudan by implication all the obligations of a state party to the Court').

preclude the Security Council, acting under its chapter VII powers, from instructing states to co-operate with the ICC if the Council were to find that non-co-operation would constitute a threat to international peace and security. Where the Security Council has not specifically decided that the failure of states to co-operate with the ICC is a threat to international peace and security, the question remains whether the power of referral afforded by the ICC Statute to the Security Council implies a duty of states to make arrests and surrender suspects for trial in the ICC.

When the Security Council referred the situation in Darfur to the ICC, it did decide that[57]

> the government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the Court and the prosecutor pursuant to this resolution and, while recognising that states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and other international organisations to co-operate fully.

The obligation included in this directive could arguably be confined to co-operating in the pending investigation into the situation in Darfur. However, the wording of the ICC Statute relating to Security Council referrals seems to go well beyond these confines.

Article 13(2) provides that

> [t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if .... [a] situation ... is referred to the prosecutor by the Security Council acting under chapter VII of the Charter of the United Nations.

This wording implies that the reach of a Security Council referral is not confined to conducting an investigation, but extends to the exercise of jurisdiction emanating from the investigation. Calling on states to co-operate therefore includes co-operation in all matters that would facilitate the exercise of jurisdiction with respect to the crimes within the subject matter jurisdiction of the court.

It is interesting to note that the ICC itself preferred a much more restricted focus of the duty of state parties to co-operate in bringing President Al Bashir to justice; one conspicuously designed to avoid a ruling as to the discrepancy between articles 98(1) and 27(2). The pre-trial chamber of the ICC preferred to leave this discrepancy to rest until another day.

Responding to the refusal of Kenya and Chad to arrest and surrender President Al Bashir for prosecution in the ICC, a Pre-Trial Chamber on 27 August 2010 set proceedings in motion, which under article 87(7) of the ICC Statute apply '[w]here a state party fails to comply with a request to co-operate by the Court contrary to the provisions of this

57 SC Res 1593 (2005) (n 3 above) para 2.

Statute'.[58] It adopted two resolutions informing the Security Council of the UN and the Assembly of State Parties about President Al Bashir's visits to Kenya and Chad (respectively) 'in order for them to take any action they may deem appropriate'.[59] The decisions were forwarded to the Security Council by the President of the Assembly of State Parties on 28 August 2010.[60]

The Pre-Trial Chamber did not base the obligation of Kenya and Chad to execute the warrant of arrest on article 27; nor was any mention made of article 98(1) of the ICC Statute. It based the obligation of Kenya and Chad 'to co-operate with the Court in relation to the enforcement of ... [the] warrants of arrest' on a passage in SC Resolution 1593 (2005) which 'urges all states and concerned regional and other international organisations to co-operate fully' with the Court,[61] and on article 87 of the ICC Statute, which affords to the ICC authority to request co-operation of state parties with the Court.[62]

Confining the duty of states to co-operate in bringing President Al Bashir before the ICC on the wording of the Security Council's referral resolution was evidently prompted by an easy-out strategy, leaving a final decision on the application of, and the conflict between, articles 98(1) and 27(2) for another day. That day will break when the indictment of a state official with sovereign immunity derives from a state party referral or an investigation conducted by the prosecutor *proprio motu*. The problem will not simply go away.

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58 Art 87(7) ICC Statute, which provides: 'Where a state party fails to comply with a request to co-operate ... the Court may make a finding to that effect and refer the matter to the Assembly of State Parties or, where the Security Council referred the matter to the Court, to the Security Council.'

59 *Prosecutor v Omar Hassan Ahmad Al Bashir (Decision informing the United Nations Security Council and the Assembly of State Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya)* Case ICC-02/05-01/09-107 (27 August 2010); *Prosecutor v Omar Hassan Ahmad Al Bashir (Decision informing the United Nations Security Council and the Assembly of State Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad)* Case ICC-02/05-01/09-109 (27 August 2010).

60 ICC Press Release of 9 September 2010, UN Doc ICC-CPI-20100921-PR575.

61 SC Res 1593 (2005) (n 3 above) para 2. Resolution 1593 also quite redundantly took note of 'the existence of treaties referred to in article 98-2 of the Rome Statute'. Article 98(2) deals with status of forces agreements and was abused by the United States under the Bush administration to secure that states enticed into signing 'article 98(2) agreements' with the United States will never surrender an American national to stand trial in the ICC. Reference to 'treaties under article 98-2' was without doubt a condition precedent for the United States not to veto Resolution 1593 (the United States and China abstained but did not veto the resolution).

62 Art 87 ICC Statute (relating to 'Requests for co-operation: General provisions'). One might have expected that a reference to art 86, which deals with 'General obligation to co-operate', would have been more appropriate.

7 Concluding observations

The ICC was established for the primary purpose of ensuring 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation'.[63] The Review Conference in its stocktaking Declaration on Co-operation emphasised 'the crucial role that the execution of arrest warrants plays in ensuring the effectiveness of the Court's jurisdiction' and further emphasised 'the primary obligation of state parties, and other states under an obligation to co-operate with the Court,[64] to assist the Court in the swift enforcement of its impending arrest warrants'.[65] Chad and Kenya were part of the body of states that endorsed the Declaration in Kampala by general agreement.

As matters currently stand, the arrest and prosecution of President Al Bashir seem practically impossible. This does not mean that his indictment to stand trial in the ICC is without drastic consequences. He remains for all ends and purposes under house arrest for fear that he might be arrested if he were to travel abroad. He consequently did not attend the inauguration on 9 May 2009 of Jacob Zuma as President of the Republic of South Africa, or the summit meeting of the AU that was held in Uganda on 19-27 July 2010.[66] Most notably, perhaps, was his conspicuous absence from the soccer World Cup championship that took place in South Africa in June/July 2010.

63 Preamble para 4 ICC Statute.

64 Non-party states can on an *ad hoc* basis contract an obligation to co-operate with the ICC. Art 12(3) ICC Statute.

65 Declaration on Co-operation Doc RC/ST/CP/2 para 5 (8 June 2010).

66 See JE Méndez 'The importance of justice and security' para 23 ICC Doc RC/ST/PJ/INF 3 (30 May 2010) (noting that President Al Bashir 'has become isolated').

AFRICAN HUMAN RIGHTS LAW JOURNAL

Dawn of a new decade? The 16th and 17th sessions of the African Committee of Experts on the Rights and Welfare of the Child

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Summary

The 16th and 17th sessions of the African Committee of Experts on the Rights and Welfare of the Child took place at the African Union Commission Headquarters in Addis Ababa, Ethiopia, in November 2010 and March 2011, respectively. This article provides an overview of these sessions, together with the Civil Society Organisations Fora that preceded these sessions. These sessions featured significant developments in the work of the Committee. The first relates to a new collaboration between a network of five non-governmental organisations and the Committee to promote the work of this treaty body. Secondly, the Committee delivered its first communication, finding against the government of Kenya in regard to the right to nationality (amongst other rights) of Nubian children in Kenya. These two activities are major highlights for the Committee in the execution of its mandate. It is argued that, despite the challenges faced by the Committee, it is at the threshold of a new era through which it may be established as a significant regional human rights treaty body.

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1 Introduction

The 16th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), the body responsible for monitoring the implementation of children's rights in Africa,[1] took place from 8 to 12 November 2010 in Addis Ababa, Ethiopia, at the African Union (AU) Commission Conference Centre. The terms of office of six members of the Children's Committee lapsed in June 2010. These members were Boipelo Lucia Seitlhamo (Botswana); Marie Chantal Koffi (Côte d'Ivoire); Martha Koome (Kenya); Mamosebi Pholo (Lesotho); Mousa Sissoko (Mali); and Seynabou Diakhate (Senegal). To date, neither the African Children's Committee nor the AU Office of the Legal Counsel has conclusively followed up on paragraph 8 of Decision EX/CL/233 (VII) of 2005 of the Executive Council of the AU Commission in terms of measures to renew the terms of office of Committee members.[2]

Consequently, six new members were elected to fill these vacancies during the 15th Summit of the AU Heads of State and Government, held in Kampala, Uganda, from 19 to 27 July 2010. These new members are Fatima Delladj Sebba (Algeria); Alfas Chitakunye (Zimbabwe); Benyam Dawit Mezmur (Ethiopia); Amal Mohamed Elhengary (Libya); Felicite Muhimpundu (Rwanda); and Clement Julius Mashamba (Tanzania). In January 2011, at the 16th Summit of the AU Heads of State and Government, held in Addis Ababa, Ethiopia, a seventh member was elected – Julia Sloth-Nielsen (South Africa) – taking the place of Dawlat Ibrahim Hassan (Egypt) whose term of office lapsed in January 2011. With five of the seven new members of the Committee being women, the gender representation in the Committee remains more or less balanced, comprising five men and six women. With regard to geographical representation, the continued appointment of members of the Committee from North Africa (Algeria and Libya) appropriately addresses previous complaints in relation to a lack of representation from North Africa on the Committee.[3]

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1 Art 32(1) African Children's Charter.

2 In terms of art 37(1) of the African Children's Charter, members of the African Children's Committee 'may not be re-elected' upon the expiration of their specified five-year term of office. This remains a disadvantage to the fulfilment of the Committee's mandate. See J Sloth-Nielsen & BD Mezmur (1) 'Win some, lose some: The 10th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 211-212; BD Mezmur & J Sloth-Nielsen (2) 'An ice-breaker: State party reports and the 11th session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 599; J Sloth-Nielsen & BD Mezmur 'Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9 *African Human Rights Law Journal* 339.

3 See Sloth-Nielsen & Mezmur (1) (n 2 above) 213.

The 17th session of the African Children's Committee started with a closed preliminary session on 21 March 2011. The official opening of the 17th session of the Committee took place on 22 March and the session lasted until 24 March 2011.

In this article, an update is given of current developments around the African Charter on the Rights and Welfare of the Child (African Children's Charter), and particularly the work of the African Children's Committee, given that the 17th session marked the tenth year anniversary of the Committee's existence.[4] Other issues covered in the article include the continuing involvement and engagement of civil society organisations (CSOs) with the Committee, particularly around the Committee's strategic plan for the period 2010 to 2014; the presentation of country reports by Rwanda and Togo; communications dealt with by the Committee; and closer collaboration between the African Children's Committee and the United Nations (UN) Committee on the Rights of the Child (CRC Committee).

2 Procedural and administrative matters

The 16th session of the Committee was attended by ten members, more than the seven members required to form a quorum.[5] Also in attendance were representatives of child-focused CSOs, such as the African Child Policy Forum (ACPF), Addis Ababa; the Child Helpline International (CHI), the Netherlands; Child Protection International Senegal; the Plan Coalition Camerounaise des ONG pour les Droits de l'Enfant (COCADE); the Institute for Human Rights and Development in Africa; the ILO Regional Office Addis Ababa; Plan International Sweden, Cameroon, Kenya and Ethiopia; Save the Children Ethiopia; UNESCO Rwanda; and the United Nations Children's Fund (UNICEF) Liaison Office to the African Union Commission. The attendance at the 17th session by CSOs was quite extensive, along with similar organisations that attended the 16th session as well. What is of concern, though, is the attendance of national children's rights-focused organisations. At the 17th session, only two national CSOs were present: the Community Law Centre of the University of the Western Cape in South Africa and the Child Protection Alliance of The Gambia. That said, both organisations reach out to a more regional focus in their work. There is also a conspicuous absence of national human rights institutions in attendance at the Committee sessions. It is suggested that the Committee reach out to these institutions, as they play a vital role in the

4 While the African Children's Charter entered into force in 1999, the African Children's Committee was formally established in July 2001 and had its inaugural meeting in May 2002.

5 Art 38(3) of the African Children's Charter provides that '[s]even Committee members shall form the quorum'.

implementation of the African Children's Charter and children's rights in their specific countries.

Apart from national organisations possibly not knowing that the African Children's Committee exists, reasons for the minimal interaction of such organisations may have been resource-related.[6] Apart from having one session in Egypt during 2007, the Committee has always had its sessions in Addis Ababa, Ethiopia. Even though Addis Ababa is in the middle of the African continent, the fact that the Committee has had all but one of its sessions in Addis Ababa is of itself a bar for national organisations in specific countries to attend the sessions. In other words, the more the Committee holds its sessions in different countries, the more diversity there might be in the representation of national organisations of such countries or even neighbouring countries at such sessions.[7] However, there are logistical issues to consider if Committee sessions are to be held outside of Addis Ababa. Such issues include the need to relocate the Secretariat to the designated location and the fact that the AU houses official translators whose services are required during the sessions. It is therefore more practical for the Committee sessions to be held in Addis Ababa at this point in time.

The 16th session of the Committee was opened by the Director for Social Affairs of the AU Commission, Dr Olawale I Maiyegun, who welcomed the six newly-appointed members of the Committee; urging the Committee, among others, to focus on the consideration of the best interests of the child throughout the session. The acting Chairperson[8] of the Committee, Mrs Agnes Kabore Outtara, also welcomed in her statement the new members of the Committee and gave an update on the Committee's activities. She expressed gratitude to Save the Children for sponsoring the previously-concluded induction course for Committee members. Subsequent to this, the Committee withdrew for a closed consultative meeting to discuss procedural and administrative issues. These issues included the election of a new bureau,[9] the adoption of the agenda and programme of work as well as the organisation of work.

The election of a new bureau was preceded by some debate due to the fact that one of the Committee members, Mrs Maryam Uwais, who was absent during the session, had sought to be elected as a member of the bureau. She had sent in a power of attorney to enable her to be elected *in absentia*. The Committee, however, decided that any

6 See L Wakefield 'Setting the trend? Civil society participation with selected structures of the African human rights system' (2011) 16 (unpublished and forthcoming) (copy of paper on file with the authors).

7 As above.

8 Up to May 2010, the Chairperson was Seynabou Diakhate and her term of office lapsed at the end of May 2010. In the interim, until the election of the next bureau, the Vice-Chairperson, Agnes Kabore, was designated the acting Chairperson.

9 Art 32(2) of the African Children's Charter provides for the election of officers from the Committee for a two-year period.

member who is absent from a session would not qualify for election. This decision was made based on advice from the representative of the Office of the Legal Counsel who conducted the elections of the bureau. Accordingly, the newly-elected members of the bureau are as follows:

- Ms Agnes Kabore Ouattara, Chairperson;
- Mr Cyprien Adebayo Yanclo, First Vice-Chairperson;
- Mr Benyam Dawit Mezmur, Second Vice-Chairperson
- Ms Fatima Delladj-Sebaa, Third Vice-Chairperson;
- Mr Clement Julius Mashamba, Rapporteur.

The 17th session of the Committee was opened by Dr Johan Strijdom, Head: Division of Social Welfare, Vulnerable Groups, Drug Control and Crime Prevention, on behalf of the Commissioner for Social Affairs, AU Commission. The commissioner expressed concern in relation to the number of state parties to the African Children's Charter complying with their reporting obligations, as only 14 out of the 45 state parties have reported thus far. The rest of the morning was spent in a closed session in order to adopt the work plan and for other administrative matters. Also during the proceedings of the first day, the representative of the Political Affairs Department within the AU Commission mentioned their plans to review the working procedures of all the human rights structures in order to harmonise these procedures. This is a welcome development which should not go ignored and should be monitored.

All six newly-appointed members of the Committee were in attendance at all the meetings of the 16th session, together with four of the earlier members, while the seventh new member participated during the 17th session. Thus, ten members of the Committee were in attendance at the 16th session while all 11 members were in attendance at the 17th session. What follows is the newly-constituted Committee:

- Ms Agnes Kabore Outtara (Burkina Faso)
- Mr Cyprien Adebayo Yanclo (Benin)
- Mr Benyam Dawit Mezmur (Ethiopia)
- Ms Fatima Delladj-Sebaa (Algeria)
- Mr Clement Julius Mashamba (Tanzania)
- Ms Maryam Uwais (Nigeria)
- Mr Andrianirainy Rasamoely (Madagascar)
- Ms Felicite Muhimpundu (Rwanda)
- Ms Amal Mohamed Elhengary (Libya)
- Mr Alfas Muvavarigwa Chitakunye (Zimbabwe)
- Ms Julia Sloth-Nielsen (South Africa)

3 Induction session

The idea of an induction session for the newly-appointed members of the African Children's Committee was conceived and sponsored by the

Department of Social Affairs of the AU Commission in collaboration with Save the Children. The induction was targeted at the newly-appointed members of the Committee given their diverse educational and professional backgrounds,[10] the complexities of the tasks of implementing and monitoring the African Children's Charter and the emerging nature of the working methods, policies, guidelines and the operating environment of the Committee. The aim was to get the new members properly acquainted with the AU system, the Committee's mandate, roles and responsibilities and the political, legal and socio-economic environment in which the new members would be working for purposes of effectively discharging their mandate under the African Children's Charter. All newly-appointed members of the Committee participated in the induction session together with most of the other members of the Committee who were also present throughout the induction exercise.[11] This proved to be invaluable mainly because the new members were able to gain from practical examples and the experiences of the older members.

3.1 Course content

The course commenced with a study of the history, content and particularities of the African Children's Charter in order to lay a foundation for subsequent discussions. An overall picture of the impact of the Children's Charter on law and practice on the continent was also given, with particular emphasis on the harmonisation of domestic laws with the standards set in the Charter. Structurally, the course dealt with the AU and the African human rights system generally and the relationship between the Committee and the AU and its place in the African human rights system, particularly the establishment and role of treaty body mechanisms generally, with the emphasis on the CRC Committee. The aim of this was to provide a platform from which the Committee could learn from and build upon. This is important, given that the CRC Committee has been much more active in terms of engaging with state parties' reports, the issuing of concluding observations and general comments, having days of general discussions, engaging with CSOs and generally providing guidance to state parties in the fulfilment of their obligations under CRC.[12]

10 Four of the new Committee members have a legal background while the other three have backgrounds in social work, child psychology and education.

11 The older members of the Committee in attendance were the acting Chairperson, Ms Kabore, Mr Yanclo and Mr Rasamoely. The Secretary to the Committee, Ms Cisse, was also in attendance.

12 While the African Children's Committee is yet to issue a General Comment, the CRC Committee has issued 13 General Comments dealing with diverse children's rights issues. These General Comments have assumed the role of binding (albeit soft) law by which state parties are expected to be guided in fulfilling their mandates to promote and protect the rights of children at a domestic level.

The most important session of the course focused on the establishment, mandate, role and functions of the African Children's Committee as provided under part two of the Children's Charter.[13] The session was aimed at ensuring a thorough understanding of the role and responsibilities of the Committee under the Charter in order to ensure that the Committee members are equipped to effectively discharge their duties. It was an important session for both the new and older members of the Committee for purposes of continuing the Committee's mandate. The final session focused on ways to build upon the successes of the Committee, addressing existing shortcomings and charting the way forward within and beyond the Committee's 2010-2014 strategic plan.

3.2 Matters arising

The induction course generated lively debates and discussions among the Committee members on matters ranging from substantive rights in the African Children's Charter to the practices of the Committee thus far. On the Charter provisions, the age of the child, child participation, corporal punishment, religious rights and the responsibilities of the child are some of the matters that were discussed. The general conclusion was to the effect that there remains a need for continuing engagement between the Committee and state parties to the Charter for purposes of securing harmonisation with the standards set in the Charter, and a degree of uniformity among state parties based on compliance with the Charter provisions at the domestic level. Achieving this would require proactive and progressive measures on the part of the Committee through means such as the issuing of general comments, the organisation of days of general discussion and highlighting relevant issues in the concluding observations following the consideration of state party reports. These would not only serve as explanatory guides or reference points for state parties in terms of their obligations under the Charter, but would also enrich the jurisprudence of the Children's Committee on children's rights issues in Africa by dealing with specific subjects in ways that resonate with African realities.

On the role and importance of the African Children's Committee within the African human rights system, based on an assessment of the Committees' existence for about a decade, the Committee cannot be considered redundant as major achievements have been recorded despite the enormous administrative, technical, financial and other challenges confronting the Committee. Some of the developments on the African continent in relation to children's rights are the following:

- The near universal ratification of the African Children's Charter and its impact on domestic law reform in various African countries,

13 Part II of the African Children's Charter comprises arts 32-48 of the Charter with arts 32-46 focused on the establishment, organisation, mandate and procedure of the African Children's Committee.

with particular reference to the important peculiar features of the Charter on children's rights;[14]
- While the Charter represents a positive attempt to give children's rights specific application within the African context, there is a need for the Committee's existence and role, to ensure that due effect is given to those provisions;
- The gradual growth in state reporting to the Committee shows that state parties view the Committee and their obligations under the Charter seriously;
- The matter of childhood and children's rights in Africa has always been subject to debates due to cultural, religious, socio-economic and other issues. The Committee therefore stands in a strategic position to lay down African perspectives on children's rights while furthering the advancement of children's right generally.

Another matter for discussion was the need to enhance the Committee's visibility and credibility as a separate body within the African human rights system network. Dealing with communications and issuing concluding observations on the communications were highlighted as key elements for achieving this goal as it would give the Committee a presence. In relation to this, the importance of renewing the terms of office of Committee members was again discussed. There remains a need for the Committee to look into the possibility of re-election of Committee members, as opposed to serving just one term of five years. This would help the Committee to have a greater impact in terms of knowledge and experiences gained as well as avoiding a premature loss of intellectual input and expertise, improving overall institutional capacity, efficiency and output.

However, since the difficulty with the matter of tenure elongation lies within the African Children's Charter which provides for the term of office of Committee members who do not have the mandate to amend the Charter, it was proposed that former Committee members (as 'Friends of the Committee') should be involved in the process of presenting the issue before the legal department of the African Union to address the matter. During the 16th session the Committee requested Ms Dawlat Ibrahim to take charge of forming such a group. It was agreed that the existence of such a body would also serve the purpose of forging closer working links between current and past members of the Committee in addition to helping to improve the transition process and period between outgoing and incoming members of the Committee.

14 See B Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *South African Public Law* 1.

4 Ratification status

Currently, 46 states have ratified the African Children's Charter, with Zambia being the 45th state to accede in 2010 and Djibouti the 46th state to ratify the Children's Charter during March 2011. The eight states that have not ratified the Charter are Central African Republic, the Democratic Republic of Congo, Sahrawi Arab Democratic Republic, Somalia, South Sudan, São Tomé and Principe, Swaziland and Tunisia. The Democratic Republic of Congo has taken the positive step of signing the African Children's Charter on 2 February 2010. São Tomé and Principe has also signed the Charter. Of the 46 states that have ratified the Charter, only 14 have so far presented their reports before the African Children's Committee.[15] One can therefore see that there are multiple states that have completely ignored their reporting duties in terms of the African Children's Charter, which leads us to a discussion of state reporting.

5 State reporting

The persistent low level of state reporting before the African Children's Committee, as required by article 43 of the African Children's Charter,[16] was a key theme for discussion during the Committee's induction session and it was concluded that proactive measures would have to be taken by the Committee to get states to submit their reports. Sloth-Nielsen and Mezmur previously highlighted three strategies that may be used in order for the Committee to intensify its efforts in promoting the importance of states reporting on their duties. These are (1) urging state parties who are struggling to comply with the strict timelines for both initial and first periodic reports to do a combined report;[17] (2) reminding state parties who are late in reporting by way

15 See the table prepared by F Shehan *Advancing children's rights: A guide for civil society organisations on how to engage with the African Committee of Experts on the Rights and Welfare of the Child* (2010) 109-110.

16 Art 43(1) provides: 'Every state party to the present Charter shall undertake to submit to the Committee ... reports on the measures they have adopted which give effect to the provisions of this Charter and of the progress made in the enjoyment of these rights: (a) within two years of the entry into force of the Charter for the state party concerned; and (b) thereafter, every three years.' Art 43(2) provides further: 'Every report made under this article shall: (a) contain sufficient information on the implementation of the present Charter to provide the Committee with comprehensive understanding of the implementation of the Charter in the relevant country; and (b) shall indicate factors and difficulties, if any, affecting the fulfilment of the obligations contained in the Charter.'

17 J Sloth-Nielsen & B Mezmur 'Like running on a treadmill? The 14th and 15th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2010) 10 *African Human Rights Law Journal* 541.

of a letter;[18] and (3) targeting state parties who have submitted reports to the CRC Committee to follow up by submitting their country reports to the Committee.[19] These are fairly solid recommendations for the Committee to take into account when urging state parties to report on their domestication of the African Children's Charter. What would also be of assistance is if state parties are made aware that what they report to the CRC Committee can also be reported to the African Children's Committee with an addendum of issues that might not be specifically covered in CRC.[20]

That said, at the 17th session the Committee decided that a *note verbale* should be sent to the 10 countries whose reports are overdue by 10 years, indicating that if they continue to fail to submit any reports to the Committee, the Committee will consider the rights of children in these countries without a report. The Committee will invoke provisions of its Rules of Procedure which allow it to do the latter. This is a welcome, proactive decision by the Committee which the Committee should regard as a priority.

The report of Rwanda was considered during the 16th session, while that of Togo was considered at the 17th session. The government of Cameroon was expected to present its state report at the 17th session, but asked to present at the next session. The first observation relates to the date that these reports were filed. Rwanda ratified the African Children's Charter on 11 May 2001 and only filed its initial report during 2010. Cameroon ratified the Charter on 5 June 1997 and only filed its initial report in 2009, failing to present it in 2011. Togo, on the other hand, ratified the Charter on 5 May 1998, while only filing its initial report in September 2010 and presenting this report to the Committee in March 2011. These reports were respectively seven, 11 and eight years late.[21] The Committee had to, as a minimum, question the state parties as to reason for their late reporting. This in itself might also serve as a caution to other state parties to the Charter on the lack of reporting of these states to the Committee.

5.1 Presentation of country report: Rwanda

The Rwandese delegation was led by the Minister of Gender and the Family who began by explaining the reason for the delay between the time of Rwanda's signing the African Children's Charter and the date it was acceded to: The delay was due to the upheaval in Rwanda in

18 J Sloth-Nielsen & B Mezmur (n 17 above) 542.

19 As above.

20 Eg, art 31 of the African Children's Charter that deals with the 'responsibility of the child' is not covered in CRC.

21 In terms of art 43(1)(a) of the African Children's Charter, every state party is to present its initial report on the implementation of the Children's Charter two years after the entry into force of the treaty. Togo is eight years late, as the country report stipulates that the African Children's Charter only entered into force during 1999.

the 1990s.[22] The report covered five themes: general, legislative and political measures taken to implement the Charter; the protection of vulnerable children; the participation of children in the organisation of the annual summit for children since 2004; resource allocation for child protection; and major challenges and measures to address them. Major challenges facing the implementation of children's rights in Rwanda as highlighted by the Minister include the scourge of AIDS resulting in increasing numbers of orphans; a persistently high infant mortality rate; a low level of enlightenment on children's rights among the populace; inadequate co-ordination among the stakeholders in the children's rights field; and poverty-related difficulties confronting families, fuelled by the consequences of the 1994 genocide. It is very important to note that for each problem, the Minister highlighted measures needed to combat them, which included combating poverty as a priority objective of the millennium development goals (MDGs) and setting up maternity and infant mortality reduction programmes.

The African Children's Committee, in the spirit of constructive dialogue, raised questions in response to the presentation, focusing on areas such as the content and outcomes of the policies and strategies implemented by Rwanda under the African Children's Charter, the role of the National Commission for Children, the proportion of the state budget allocated to the promotion of children's rights and welfare, and the statistics of refugee and working children as well as the benefits, if any, that children derive from self-help organisations. In providing answers to these questions, the Minister stated that the government of Rwanda was determined to secure the protection of children's rights and welfare based on the foundation of good governance advocated by the President of the Republic of Rwanda. The Committee Chairperson congratulated and thanked the Rwandese delegation for the report and particularly for the clarity of the responses provided to the Committee's enquiries. The caliber of the Rwandese delegation was indeed very impressive and was adequately equipped and sufficiently knowledgeable to engage with the Committee and provide proper responses to all questions posed. This was regarded as highly commendable by the Committee.

5.2 Presentation of country report: Togo

The Togo country report was presented by Mme Memounatou Ibrahima, who is the Minister for Social Action and National Solidarity. She was accompanied by a high-level delegation from Togo and made an impressive presentation on the domestication of the African Children's Charter in Togo. These include the implementation of free education

22 Rwanda signed the Children's Charter on 2 October 1991 and deposited its instrument of accession on 11 November 1999.

and school feeding schemes, together with passing laws prohibiting female genital mutilation and human trafficking.

Even though the Minister eloquently mentioned all the positive moves by the Togolese government to advance the rights of and protection for children, it was noted that there were no judges or courts that are specialised in children's rights issues. With Togo being a monist state, one expects of the judiciary to know the provisions of both the African's Children's Charter and CRC. Without a judiciary in place, the enforcement of children's rights may be futile. After the presentation by the Minister, the African Children's Committee raised several concerns in relation to various thematic aspects of the report.[23] The Committee failed to raise any major concerns in relation to the training of the judiciary on the African Children's Charter and CRC. The training of the judiciary could also have been inferred from the concerns addressed around juvenile justice and the need for dedicated children's rights legislation.

Another unfortunate situation arising from the country report of Togo relates to the closure of centres for children with disabilities. First, the Togo report refers to children with disabilities as 'handicapped children'. This term was considered derogatory by disability discourse.[24] Notwithstanding this, the reason for the use of this term in the country report for Togo could be justified as a direct translation from the French.[25] Another reason for the use of this term is because article 13 of the African Children's Charter refers to children with disabilities as 'handicapped children'.[26] There is thus a need for the Committee to address the wording within the Charter on the topic of children with disabilities.

5.3 Pre-session for the consideration of the reports (Cameroon, Togo and Senegal)

Rule 69 of the Rules of Procedure of the African Children's Committee clearly makes NGOs and CSOs responsible for the preparation and presentation of alternative/shadow/complementary reports to the African Children's Committee, in accordance with article 42 of the Children's

23 Some of these aspects include juvenile justice, child legislation, education, child labour, traditional practices affecting children, the health system, research in relation to the causes of the problems facing children's rights, and preparations for the Day of the African Child.

24 See generally G Quinn & T Degener 'The moral authority for change: Human rights values and the worldwide process of disability reform' in G Quinn *et al Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 9.

25 In French, children with disabilities are referred to as *enfants handicaps*.

26 The 4th CSO Forum to the Committee recommended to the Committee in a Communiqué, giving an advisory opinion on art 13 giving consideration to the language used to promote the dignity of children with disabilities. Please refer to sec 8.3 for more information on the CSO Forum.

Charter. However, it still remains unclear, in the absence of formal guidelines, who may participate in pre-sessions for the consideration of state party reports.[27]

A third pre-session was held on 8 November 2010 to consider the alternative reports of NGOs from Cameroon and Togo. Preceding the 17th session, another pre-session was held on 21 March 2011 to consider the alternative report, drafted and presented by CONAFE, on Senegal's state party report. The aim of the pre-session, as obtained in the CRC Committee system, is to provide the African Children's Committee with ample information on the situation of children in the country concerned before the consideration of the state party report so as to make constructive engagement between the Committee and the state possible.

6 Communications (individual complaints)

During the 16th session of the African Children's Committee, the Secretary to the Committee presented a report as to the current state of affairs with the two communications pending before the Committee: one in relation to the violation of children's rights in Northern Uganda and the other alleging a violation of the rights of Nubian[28] children in Kenya.[29] In relation to the former, a three-member working group was appointed to determine the admissibility of the communication and report on its findings at the next session.[30] On the communication concerning Nubian children, in response to the fact that the Kenyan government was yet to respond to the Committee's requests to it to submit its written response to the communication, the Committee decided that a last reminder would be sent to the Kenyan government on that note and set up another three-member working group to take charge of that.

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27 See Sloth-Nielsen & Mezmur (2009) (n 2 above) 345; Sloth-Nielsen & Mezmur (n 17 above) 543.

28 The Nubian people living in Kenya have been brought there by the British (from Sudan) to be used as soldiers on the border. For years Nubian communities have lived in Kenya without being granted Kenyan nationality; see http://allafrica.com/stories/201104020089.html (accessed 4 July 2011).

29 For details on the history of these communications before the Children's Committee, see Sloth-Nielsen & Mezmur (n 17 above) 547; Sloth-Nielsen & Mezmur (2009) (n 2 above) 346.

30 The author of the communication, Centre for Human Rights, University of Pretoria, had requested the Committee to determine the admissibility of the communication. At the 14th session of the Committee, the author of the communication was requested to produce French versions of the communication so as to enable all members of the Committee to look into the application and decide on it. As at the 16th session, the French versions of the documents had been forwarded and so the Committee could proceed with looking into the communication.

Some progress was recorded during the 17th session in relation to the communication concerning the Nubian children. The Committee for the first time in its ten years of existence heard arguments on the merits in a communication brought by the Institute for Human Rights and Development in Africa (IHRDA) at the 17th ordinary session of the African Children's Committee, in which the right to nationality (among others) of Nubian children had been violated by the Kenyan government. Despite the absence of the Kenyan government at the proceedings, the Committee in a preliminary decision found that the Kenyan government had violated the right to nationality of Nubian children within the borders of Kenya, taking into account the fact that the right to nationality is a requirement for the realisation of other rights in the country's laws.[31]

Specifically, the Committee found that there were 'multiple violations of articles 6(2), (3) and (4), article 3, article 14(2)(b), (c) and (g), and article 11(3)' of the African Children's Charter.[32] They recommended that the government of Kenya take legislative, administrative and other measures to ensure that children of Nubian descent in Kenya acquire Kenyan nationality; that the government of Kenya implement a birth registration system that does not discriminate against Nubian children; and that the government of Kenya adopt a short-term, medium-term and long-term plan to fulfil the rights to the 'highest attainable standard' of health and education for Nubian children.[33]

Finally, the African Children's Committee also recommended that the government of Kenya report within six months to the Committee on the implementation of its recommendations. Considering that the government of Kenya was absent when this communication was considered, the Committee took the positive step of ensuring that its decision is implemented. Such an oversight function played by the Committee should be hailed as a positive step towards ensuring that the rights of children are realised within any country against which a communication is brought.

Article 44 of the African Children's Charter does not give guidance on what happens if the Children's Committee finds against a member state in a communication procedure without hearing the member state's views. Considering that the government of Kenya had been given multiple opportunities to oppose this communication and lodge a defence, their absence does not necessarily mean that the finding against them should not be executed. Therefore a decision against

31 For further information on this, see:http://www.ihrda.org/2011/06/kenya-nubian-children-should-be-given-nationality-at-birth/ (accessed 17 June 2011).

32 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice on behalf of Nubian Children in Kenya v The Government of Kenya* Communication 002/2009 para 69.

33 As above.

them *in absentia* should still be valid, as long as they had been given an opportunity to present their arguments.

7 Day of the African Child 2011: 'All together for urgent actions in favour of street children'

During its 15th session, the African Children's Committee decided that the theme for the 2011 Day of the African Child (DAC) celebration would be 'All together for urgent actions in favour of street children'.[34] Although there has been a low level of compliance on the part of states to submit reports to the Children's Committee on how the DAC was celebrated each year,[35] the words of the Ghanaian Minister of Women and Children's Affairs during this year's DAC celebration in Ghana highlight the importance of the DAC to children's rights in Africa:[36]

> The Day of the African Child has become a significant annual calendar event for AU member states to reflect, sensitise and strategise on current issues affecting the welfare and development of the African child. The Day seeks to draw the attention of all actors involved in improving the conditions of children on the continent and to unite their efforts to improve the living conditions of children in Africa.

In the concept/explanatory note guiding the 2011 DAC, the Committee outlined the objectives of this year's celebration as follows:[37]

- to determine strategic guidelines to be taken into account in efforts to enhance prospects for children living in families at risk to enjoy their rights, as a means of keeping them off the streets;
- to propose innovative strategies that are more effective in child protection and care;
- to take stock of the phenomenon of street children in African states;
- to sensitise African populations on the vital necessity of acting to protect street children since their basic rights cannot be guaranteed in a hostile environment;
- to undertake advocacy with African governments and civil society for greater resource mobilisation for the protection of children living on the street;
- to analyse current strategies which address children's needs in a bid to identify their strengths and weaknesses;

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34 Sloth-Nielsen & Mezmur (n 17 above) 549.

35 As above.

36 Statement by the Honourable Minister of Women and Children's Affairs on 16 June 2011 – Africa Union Day of the Child http://www.obuobafm.com/local-news/africa-child-celebration-2011 (accessed 22 June 2011).

37 African Children's Charter Concept Note on the commemoration of the 21st edition of the Day of the African Child on 16 June 2011 under the theme *'A*ll together for urgent actions in favour of street children' 5 (copy of note on file with authors). See also Message of the Chairperson of the African Committee of Experts on the Rights and Welfare of the Child on the occasion of the 21st edition of the Day of the African Child (2011) http://www.streetchildren.org.uk/_uploads/publications/message_english_african_day_of_the_child.pdf (accessed 22 June 2011).

- to reflect on the problems related to data on street children; and
- to provide overall care for children living on the streets, including accommodation, psychosocial mentoring and reinsertion.

The concept note further provides guidelines to state parties on how to celebrate the 2011 DAC, and obliges them to report on this to ensure monitoring and evaluation.[38] Some of the suggested measures include, among others, the raising of public awareness through multimedia campaigns and the organisation of programmes that offer material assistance and other forms of support to affected children.[39]

Moving forward, at the 17th session, the Committee also decided the theme of the DAC for 2012 to be 'The rights of children with disabilities: The duty to protect, respect, promote and fulfil'. This, as in the past, is a welcome theme as the rights of children with disabilities have been overlooked and the levels of violence and unfair discrimination faced by these children are great.[40]

8 Co-operation with civil society organisations, the CRC Committee and other stakeholders

8.1 Consideration of observer status applications

Based on the recommendation of the CSO Forum, the African Children's Committee released an amended version of its guidelines on the criteria for granting observer status to NGOs before the Committee. The amendment was geared towards increasing flexibility in the criteria which would in turn enable more CSOs to qualify for observer status before the Committee.[41] With such observer status, CSOs will be able to participate in certain sessions of the Committee which might not be open to everyone, and will be able to have easier access to documentation produced by the Committee.

However, during the 16th session, the application for observer status by Collective Defence for Right to Energy (CODDAE) of Niger was rejected on the basis that it did not comply with the guidelines. The Community Law Centre at the University of the Western Cape submitted its observer application during the 17th session and this will be considered during the 18th ordinary session.

Currently, only three organisations have been granted observer status before the Children's Committee. One application is still pending. This is a remarkably low number, considering that the Committee has

38 African Children's Charter Concept Note (n 37 above) 5.

39 African Children's Charter Concept Note (n 37 above) 6.

40 H Combrinck 'The hidden ones: Children with disabilities in Africa and the right to education' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective (*2008) 302.

41 Sloth-Nielsen & Mezmur (n 17 above) 551.

been in operation for 10 years. It is recommended that the reasons for this low number of CSOs with observer status should be investigated by the Committee.

8.2 CSO Consortium and the African Children's Committee

As part of its continuing efforts to collaborate with the Committee on the fulfilment of its mandate, a group of NGOs in the sector teamed up to promote the work of the Committee. The aim of the proposed project, entitled 'The African Children's Charter Project', is to promote the implementation of the Children's Charter through the institutional, political and other platforms of the AU. The project, which is funded by the Swedish International Development Agency (SIDA) in close collaboration with the African Child Policy Forum, the University of the Western Cape's Community Law Centre, the Institute for Human Rights and Development in Africa, Plan International and Save the Children Alliance, was first presented to the Committee during the 16th session and guided by the following objectives:

(i) to strengthen the Committee's capacity to implement portions of its strategic plan for 2010-2014;
(ii) to promote collaboration between the African Children's Committee and other bodies within the AU and regional human rights mechanisms; and
(iii) to strengthen civil society's capacity to engage with AU bodies on children's rights issues in Africa.

A three-member working group was subsequently constituted by the African Children's Committee to scrutinise the document and provide the Committee's views and comments on it, in a bid to improve the document and formulate recommendations for the relevant partners. The improved document was subsequently presented and considered during the 17th session.

At the 17th session, the recommendations by the three-member working group were discussed and the Committee's endorsement of the project sought. After discussion during a closed session on this project, the Committee gave its endorsement and agreed to collaborate in the activities and towards the objectives of this project.

8.3 CSO Forum to the African Children's Committee

The fourth CSO Forum on the African Charter on the Rights and Welfare to the Child took place between 18 and 20 March 2011 in Addis Ababa, Ethiopia. The Forum was attended by 97 people across 23 countries. Three members of the Committee (including the Chairperson) also participated in the Forum. These Committee members presented their mandate, plans, objectives and challenges in relation to the implementation of the African Children's Charter. The Forum

thus constitutes a worthy platform for CSOs to interact with members of the Committee.

At every CSO Forum, recommendations are drafted for the Children's Committee to take into consideration. The 4th CSO Forum drafted its recommendations to the Committee under the broad theme of children without appropriate care and categorised the following five thematic areas for consideration:

8.3.1 Children living and/or working on the streets and refugee and internally-displaced children

In relation to children living and/or working on the streets, the CSO Forum recommended that the African Children's Committee should consider having a day of general discussion on this topic and invite the relevant stakeholders to this day. The goal of such a day of general discussion should be to establish agreed-upon indicators for research that would inform policy and programmatic interventions. The CSO Forum also recommended that the African Children's Committee should urge state parties to the African Children's Charter to ratify and domesticate the AU Convention for the Protection and Assistance of Internally-Displaced Persons in Africa[42] in order to grant greater protection to refugee and internally-displaced children.

8.3.2 Alternative care

This recommendation was framed with the notion that the institutionalisation of children should be kept to a minimum and, where possible, family-related options should be explored where biological parents are no longer able to provide care. The CSO Forum noted that there exists a lack of consensus on when adoption (including inter-country adoption) should be considered in such an instance. It therefore recommended that the African Children's Committee adopt a general comment on the interpretation of article 24 of the African Children's Charter,[43] with a view to giving consideration to issues relating to alternative care, inter-country adoption and the best interests of the child in an African context.

8.3.3 Rights of children with disabilities

The terminology used to describe persons (including children) with disabilities has undergone various philosophical reconceptions with the aim of ensuring that the dignity of persons with disabilities is not

42 This Convention is also known as the Kampala Convention and has not yet come into force as 15 African states have to ratify it and thus far this number has not been reached.

43 Art 24 of the African Children's Charter is entitled 'Adoption'.

violated.[44] Therefore, terminology such as 'imbeciles, idiots and handicapped persons' is no longer considered to promote the human dignity of persons with disabilities. Article 13 of the African Children's Charter refers to children with disabilities as 'handicapped children'. Two possible reasons for using this term are: Firstly, in French, children with disabilities are described as *enfants handicaps* and therefore a direct translation from the French version might have resulted to the use of 'handicapped children' in article 13. Secondly, at the time of drafting the term, 'handicapped persons' might have been considered a justifiable description of persons with disabilities. Therefore, the African Children's Charter does not deliberately violate the human dignity of children with disabilities by heading article 13 'handicapped children'. For this reason, the CSO Forum recommended that the Committee give an advisory opinion on article 13, giving consideration to language that promotes the dignity of children with disabilities. The CSO Forum was of the opinion that an advisory opinion should rather be sought, instead of an amendment to the Children's Charter, as an amendment might open the entire Charter to review by state parties. Considering that the focus for the 2012 DAC is to be children with disabilities, this would constitute an opportune time for the Committee to adopt such an advisory opinion.

8.3.4 Child participation

Child participation is one of the key elements needed to ensure that the rights of children are realised. The CSO Forum recommended that the African Children's Committee adopt guidelines on how child participation will be realised in the fulfilment of their mandate, especially in relation to the identification of the theme of the Day of the African Child.

8.3.5 Rights of children in non-member states of the African Children's Charter

The CSO Forum raised concern with regard to the plight of children in the eight countries where the African Children's Charter has not been ratified. In this regard, the CSO Forum recommended that the African Children's Committee liaise with the African Commission on Human and Peoples' Rights (African Commission) and other regional and international human rights bodies to ensure and monitor the protection of the rights of children in these countries and to strongly urge the eight member states that have not ratified the Charter to do so.

Apart from the above recommendations communicated to the Committee, the CSO Forum also thought it best to request the Committee to consider the rights of children in Libya and Côte d'Ivoire where, at

44 See generally Quinn & Degener (n 24 above).

the time, a fair amount of conflict was taking place. In this regard, the CSO Forum asked that the Committee request specific responses from the state delegation of Libya to ensure that all parties to the conflict ensure the right to free movement, the protection of children in armed conflict, the transit of humanitarian supplies and personnel to Libya and to respect the distinction between military and non-military targets.

These recommendations from the CSO Forum to the Children's Committee are welcomed, as they are very specific in what is needed, yet not too detailed for the Committee to be of the view that CSOs are prescribing to the Committee how it should go about executing these. Considering that most of the previous recommendations by the CSO Forum to the Committee have not been implemented, it would be wise for the Committee to possibly prioritise one or two of these recommendations for execution.

8.4 Collaboration with the CRC Committee

Flowing from a decision taken during the 15th session, some members of the African Children's Committee were in Geneva in September 2010 to attend the CRC Committee's session and held meetings with members of the CRC Committee as part of efforts to ensure greater collaboration between the Children's Committee and the CRC Committee.[45] The Chairperson of the CRC Committee had proposed the establishment of a joint working group comprising members from both committees 'to exchange views and come up with proposals for a collaboration strategy'.[46] Six members of the Committee were appointed to work on the joint working group and due to the expiry of the terms of office of three of the six members in mid-2010, one current member of the Committee was appointed to join the working group.[47]

During the 16th session, as a follow-up to the first meeting of the joint working group of the African's Children's Committee and the CRC Committee on 15 September 2010 in Geneva, Mr Mezmur was also appointed to work with Mr Kermal Filali who had been appointed by the CRC Committee to work on a comparative analysis of the African Children's Charter and CRC. In furtherance of this, during the 17th session it was revealed that the two Committees would jointly conduct two activities: 'a sensitisation mission on the African Charter to a member country and a joint workshop on the recommendations and

45 Sloth-Nielsen & Mezmur (n 17 above) 555.

46 As above.

47 The former members of the working group whose terms of office expired in mid-2010 are Seynabou Diakhate, Moussa Sissoko and Mamosebi Pholo, while the new Committee member appointed to join the working group is Benyam Mezmur. See Sloth-Nielsen & Mezmur (n 17 above). With the appointment of Mr Mezmur, the number of the Committee's members appointed to be in the joint working group has been reduced from six to four, the fourth person being the Secretary to the Committee.

observations of the two committees'.[48] It is hoped that UNICEF will provide support for the implementation of these activities.[49] This is a significant development which would go a long way in harmonising the work of both committees in the realisation of children's rights.

Another highlight of the African Children's Committee's 16th session in this area is the elaboration of certain activities to be jointly carried out by both Committees in 2011. The activities are as follows:

(i) sharing and exchanging of information;
(ii) advocacy to increase the visibility of the African Children's Charter in Africa;
(iii) carrying out a joint mission in a state party that has submitted reports to both Committees to follow up on the implementation of the recommendations made by both committees; and
(iv) carrying out a joint capacity-building workshop.

9 Conclusion

Both the 16th and 17th sessions of the African Children's Committee are significant for breaking new grounds as far as the Committee's work is concerned. First, the 16th session was preceded by an induction/training course organised as an orientation and knowledge-sharing exercise for the newly-elected members. Such a unique exercise is probably the first public treaty body induction/training course ever conducted as no precedent to it has thus far been found. Secondly, during the 17th session, the Children's Committee dealt with a communication for the first time since it was established about a decade ago. That said, the communication should also be seen in the context of when the complaint was first lodged with the Committee. It was first filed in 2009 and one of the main reasons for it being delayed was because of the Kenyan government's absence at the Committee sessions when the matter was set down to be heard. Despite these delays, that a decision was reached by the Committee within two years of a communication being brought before it is commendable in terms of speed and realising the goal of the best interests of the child.

From a substantive point of view, in order for any communication to be heard by the African Children's Committee, it has to be ensured that all its domestic remedies have been exhausted.[50] In this case, the matter was brought before the High Court of Kenya, where the matter was unduly prolonged without any judgment. The Committee innovatively

48 See the Committee's report on its 17th session, http://www.acerwc.org/wp-content/uploads/2011/03/acerwc17-report-2011-eng.pdf (accessed 18 October 2011) 11.

49 As above.

50 *IHRDA* (n 32 above) para 24.

found that the exhaustion of the local remedies rule is not rigid.[51] Even though that might sound as if the Committee has effectively set a precedent that would see many cases being heard before they have strictly complied with the exhaustion of local remedies rule, this should be read with the best interests of the child principle in mind. In this judgment, the Committee argued that it could not be in the best interests of the Nubian children to allow their fate to be in a legal limbo for a really long time.[52] Thus, all in all, a welcomed precedent was set by the Committee.

The African Children's Committee also launched a new website after the conclusion of the 17th session,[53] and which is reasonably up to date, compared with its previous website that was part of the AU website. The newly-established African Children's Charter Project[54] is also bound to increase the visibility of the Children's Committee within other structures of the African human rights system and CSOs on the continent, thereby aiding the Committee towards fulfilling its mandate. The Committee has adopted its 2010–2014 strategic plan. This plan sets out clear targets for the Committee to be reached within the next three years. The Committee's collaboration with civil society will thus serve as a tool to reach the defined targets set by the Committee in this strategic plan, especially in a project of this nature.

Thus, significant progress has been made which leads the African Children's Committee to the dawn of a new era, which many in the African children's rights sector can look forward to. With regard to dealing with communications, improving the frequency of state parties' reports and the CSO-Committee collaboration, it is hoped that these developments will give the Committee the impetus to make more positive strides in the realisation of children's rights in Africa.

51 *IHRDA* (n 32 above) para 28.

52 *IHRDA* (n 32 above) para 29.

53 http://www.acerwc.org (accessed 31 October 2011).

54 Discussed in section 8.2.

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states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal* of *International and Comparative Law 625.*

- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34 above) 243.
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  1
  2
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  3.2.1
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CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 July 2011
Compiled by: I de Meyer
Source: http://www.africa-union.org (accessed 31 October 2011)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Algeria	01/03/87	24/05/74	08/07/03	22/04/03		
Angola	02/03/90	30/04/81	11/04/92		30/08/07	
Benin	20/01/86	26/02/73	17/04/97		30/09/05	
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97			
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70				
Chad	09/10/86	12/08/81	30/03/00			
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	
Congo	09/12/82	16/01/71	08/09/06	10/08/10		
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03		
Democratic Republic of Congo	20/07/87	14/02/73			09/06/08	
Djibouti	11/11/91		**03/01/11**		02/02/05	
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02			
Eritrea	14/01/99		22/12/99			
Ethiopia	15/06/98	15/10/73	02/10/02			05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	**10/01/11**	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99	25/05/05	
Ghana	24/01/89	19/06/75	10/06/05	25/08/04*	13/06/07	06/09/10
Guinea	16/02/82	18/10/72	27/05/99			**17/06/11**
Guinea-Bissau	04/12/85	27/06/89	19/06/08		19/06/08	
Kenya	23/01/92	23/06/92	25/07/00	04/02/04	06/10/10	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05			
Malawi	17/11/89	04/11/87	16/09/99	09/09/08*	20/05/05	
Mali	21/12/81	10/10/81	03/06/98	10/05/00*	13/01/05	
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03		
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	
Namibia	30/07/92		23/07/04		11/08/04	
Niger	15/07/86	16/09/71	11/12/99	17/05/04		

Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03	25/06/04	09/07/10
Sahrawi Arab Democratic Rep.	02/05/86					
São Tomé and Príncipe	23/05/86					
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04	
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06	
Sierra Leone	21/09/83	28/12/87	13/05/02			17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
Sudan	18/02/86	24/12/72	30/07/05			
Swaziland	15/09/95	16/01/89				
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06*	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	12/10/05	
Tunisia	16/03/83	17/11/89		21/08/07		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	**31/05/11**
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	**53**	**45**	**46**	**26**	**30**	**8**

* Additional declaration under article 34(6)
Ratifications after 31 December 2010 are indicated in bold